Capitol EMI Music, Inc. *and* Chauffeurs, Teamsters and Helpers Local 391, affiliated with International Brotherhood of Teamsters, AFL–CIO[1]

Graham & Associates Temporaries, Inc., and Capitol EMI Music, Inc. *and* Chauffeurs, Teamsters and Helpers Local 391, affiliated with International Brotherhood of Teamsters, AFL–CIO. Cases 11–CA–14106, 11–CA–14152, 11–CA–14300, and 11–RC–5723

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

Exceptions filed to the administrative law judge's decision in this case[2] present the question, inter alia, whether the judge correctly decided that Respondent Graham & Associates Temporaries is jointly liable with Respondent Capitol EMI Music for the discharge of employee A. V. Harris, solely on the basis of Graham's joint employer relationship with Capitol.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] only to the extent consistent with this Decision and Order.

This case concerns, inter alia, the circumstances under which we will deem both employers in a joint employer relationship to have committed a violation of Section 8(a)(3) and (1) of the Act when only one of those employers took the unlawful action in question. In particular, we must decide whether Respondent Graham & Associates, a temporary employment agency, may properly be found to have violated Section 8(a)(3) and (1) of the Act solely on the basis of evidence that Respondent Capitol EMI Music, Inc. terminated a Graham-supplied employee for unlawful reasons. Capitol is a client employer to which Graham had referred A. V. Harris, the employee in question. We reverse the judge's finding that Capitol's unlawfully motivated termination of Harris can, under the circumstances, be imputed to Graham, and we thus dismiss the complaint against Graham. As explained below, however, our holding is a narrow one, dependent on the nature of the particular joint employer relationship and the absence of evidence suggesting that Graham either knew, or should have known, of Capitol's unlawful motives.

I. THE FACTS

Capitol distributes recording products to retail and intracompany facilities from its Greensboro, North Carolina facility. It operates with its own permanent employees as well as temporary employees referred by employment agencies. Graham is in the business of referring temporary employees to clients in both the public and private sector. The alleged discriminatee, A. V. Harris, registered for temporary employment with Graham and was assigned to a temporary position with Capitol.

The record presents the following picture of Graham's and Capitol's relationship and their differing connections to the referred employees. Graham and

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] On August 28, 1991, Administrative Law Judge William N. Cates issued the attached decision. The Respondents filed exceptions and supporting briefs. The National Association of Temporary Services also filed an amicus brief in opposition to the judge's decision.

[3] Respondent Capitol has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We affirm the judge's conclusions that Respondent Capitol violated Sec. 8(a)(1) of the Act by: coercively interrogating employees; unlawful creating the impression that its employees' union activities were under surveillance; promulgating a no-talking rule to interfere with its employees' protected rights; more closely monitoring its employees' work activities in order to interfere with their efforts to engage in union or protected activities; threatening its employees with discharge because of their union activities; soliciting employee complaints and grievances and making implied promises related thereto; threatening its employees with loss of benefits if they selected the Union as their collective-bargaining representative; threatening its employees that it would be futile for them to select the Union as their collective-bargaining representative; granting wage and other benefit increases to discourage its employees from selecting the Union as their collective-bargaining representative; and threatening not to hire employees permanently unless they voted against the Union.

In adopting these conclusions, we find it unnecessary to rely on the judge's finding that Capitol's warehouse manager, McLean, unlawfully interrogated employee Cummings; the judge found other instances of unlawful interrogation that warrant this part of his recommended remedial Order.

We also affirm the judge's findings that Respondent Capitol violated Sec. 8(a)(5) and (1) of the Act by its refusal to recognize and bargain with the Union after August 17, 1990, and by conduct amounting to the unilateral institution of new or different policies affecting wages, hours, and working conditions.

Finally, we agree with the judge, for the reasons stated in his decision, that the election conducted on October 12, 1990, should be set aside and that a *Gissel* bargaining order is warranted here. In agreeing with the judge that a *Gissel* bargaining order is appropriate in this case, Member Oviatt finds this case distinguishable from *Somerset Welding & Steel*, 304 NLRB 32 (1991), in which he dissented from the issuance of a bargaining order. Unlike the instant case, that case did not involve a large number of egregious violations. The only 8(a)(3) violation was a denial of a wage increase to one employee, a less serious violation than the discriminatory discharge involved in the instant case. Nor were the threats of plant closure disseminated to large numbers of employees. Here the Respondent not only committed a serious 8(a)(3) violation, but it also engaged in almost every type of 8(a)(1) violation, including ''hallmark'' violations. Some of the 8(a)(1) violations were widely disseminated, including a substantial wage and benefit increase given to employees to discourage support for the Union. Under such circumstances, I agree with the issuance of a bargaining order.

Capitol do not have common ownership or common financial control, nor is there a written agreement between them. They do, however, share and codetermine essential terms and conditions of employment. Thus, Graham negotiated the wage rates of its temporary employees assigned to Capitol. The temporary employees, in turn, kept their own records of their hours, and they received wages and benefits from Graham.

Capitol's personnel assigned all work and directly supervised the temporary employees referred to them by Graham. Capitol also effectively disciplined these temporary employees by taking corrective actions related to its day-to-day instructions to them. Indeed, Capitol could effectively fire any or all these temporary employees by simply requesting that Graham remove them from Capitol's operations. Graham always honored such requests. There is no indication in the record that these temporary employees were held out to the public to be anything other than Capitol employees.

Graham's removal of Harris from Capitol was prompted by two telephone calls by two different Capitol officials to two different representatives of Graham. All four persons involved in these two conversations testified that Harris' union activities at Capitol were not mentioned, and the two Graham representatives also testified that they were not otherwise aware of such activity.[5]

A Graham manager, LaDonna McGhee, testified that she told Harris:

> Exactly what Ruth Garrison [of Capitol] had told me, that . . . he was not doing what he had been asked to do. He was not being cooperative with the supervisors . . . [and] . . . about the breakroom where they would find him at 3:00 when he didn't really check out until 3:30.

McGhee also testified that Harris said he understood exactly where they were coming from and asked about other assignments.

After Harris was removed from his Capitol assignment, he was offered assignments with two different companies by Graham. Although Harris accepted the assignments, he did not report for work at either assignment.[6]

II. THE JUDGE'S DECISION

Having concluded that Capitol was unlawfully motivated in making the request to Graham to remove Harris and that Capitol and Graham are joint employers,[7] the judge turned to the question of whether Graham should be held vicariously liable for the unlawful act of Capitol. In addressing this question, the judge specifically pointed out that there was ''no argument or evidence of culpability on the part of Graham apart from [its] being a joint employer with Capitol.''

Relying on the Board's decision in *Pacemaker Driver Service*,[8] the judge concluded that Graham was vicariously liable for the unlawful removal of Harris from Capitol on the sole basis of their joint employer status. The judge observed that the vicarious liability aspect of *Pacemaker* was reversed on appeal, but held that he was bound by Board precedents until the Board or the Supreme Court overrules them.

Having so held, the judge proceeded to note, in agreement with Graham's counsel, that there is no showing of any kind that Graham ''knowingly participated'' or even ''acquiesced without protest'' in any ''unfair labor practices of Capitol related to Harris' removal from Capitol's operations.''

III. POSITIONS OF THE PARTIES

Graham contends that a mere finding that it is a joint employer with Capitol is not an adequate basis for imputing to it Capitol's unlawful motivation for a discharge decision when, as Graham argues, it had no knowledge of that motivation and no control over that type of decision, i.e., Capitol's decisions to terminate Graham-supplied employees. Its only option when a client employer terminates such an employee, it argues, is to reassign the employee elsewhere, as it sought to do with Harris.

Graham further argues that *Pacemaker*, supra, on which the judge relied, is not a sound authority, both because the Board's decision was denied enforcement by the court of appeals and because, according to the court's decision, it appears that the Board defended its Order in terms suggesting that it recognized that one joint employer could not be found liable for an action taken solely by the other joint employer in the absence of evidence of some knowledge of the latter's unlawful motivation.[9] Graham points to the judge's finding here

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[5] There is no dispute that Graham removed Harris from his assignment at Capitol in response to Capitol's request.

[6] Graham later terminated Harris. This latter termination by Graham is not the subject of the complaint here.

[7] We agree with the judge, for the reasons stated in his decision, that Capitol violated Sec. 8(a)(3) by having Harris removed from his job at Capitol. See fn. 21, infra. We also agree that Capitol and Graham are joint employers of Harris.

[8] 269 NLRB 971 (1984), rev. in pertinent part sub nom. *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985).

In *Pacemaker*, the Board had adopted an administrative law judge's decision in which one employer (Pacemaker) was held liable for the actions of another employer (Carrier Corporation) simply on the basis that the two were joint employers.

[9] The court described the General Counsel as arguing on behalf of the Board that ''Pacemaker was not a wholly innocent party because it 'acquiesced without protest' in Carrier's decision to close down [the terminal in which an organizing campaign had commenced].''

Graham also notes *C. R. Adams Trucking*, 262 NLRB 563 (1982), enfd. 718 F.2d 869 (8th Cir. 1983), but argues that in that case of joint employer liability for an 8(a)(3) violation it does not appear that the ''innocent'' employer argued against vicarious liability.

that it was not even aware that Harris had engaged in any union activities or harbored any union sentiments, let alone that Capitol had terminated him for those reasons.

Finally, Graham urges the Board to follow the line of reasoning it has used recently in determining whether to hold employers vicariously liable for violations in the operation of union hiring halls from which they obtain employees, i.e., to require a finding that the party to whom liability is to be imputed knew or should have known about the unlawful action committed by the other party.[10]

The National Association of Temporary Services (NATS), appearing as amicus curiae, contends that the judge's decision, if allowed to stand, would have a serious adverse impact on the temporary help industry, and it argues that the theory of vicarious liability employed by the judge is inconsistent with the approach adopted by courts and agencies under certain other statutes with respect to the liability of temporary help agencies for worksite safety violations and violations of requirements for structuring worksites to accommodate the disabled.[11]

IV. DISCUSSION

It is undisputed here that the 8(a)(3) violation charged in this case is a violation that must rest on proof of antiunion motive.[12] The question is whether knowledge of a motive harbored by one employer should be imputed to the other simply because they are the joint employers of the same work force. In the circumstances of this case, we find that it should not.

Joint employers are businesses that are entirely separate legal entities except that they both ''take part in determining essential terms and conditions'' of a group of employees. *Manpower, Inc*., 164 NLRB 287, 288 (1967). Accord: *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122–1123 (3d Cir. 1982), and cases there cited. Where such codetermination of terms and conditions of employment of an appropriate unit of employees is shown, the Board finds that the joint employers share an obligation to bargain with a properly designated employee bargaining representative.[13] As Graham observes, however, we are referred to only two cases where the Board has found a violation of Section 8(a)(3) by two joint employers by imputing the motive of one to the other.[14] In neither case did the Board articulate any specific rationale for such vicarious liability, and, as Graham also correctly notes, it is not even clear that the Board considered the issue in one of those cases.[15] Furthermore, to the extent those cases suggest that a joint employer is automatically liable even for actions in matters over which the other employer possesses exclusive authority, they are inconsistent with Board precedent concerning the determination of the scope of a joint employer relationship.[16] In sum, if we are going to impute Capitol's unlawful motive in the termination of Harris to Graham, it is imperative that we supply some reasoned basis for doing so.

It is conceivable that joint employers might perceive a mutual interest in warding off union representation from the jointly managed employees. In such cases, one joint employer, by its unlawful conduct, might reasonably be regarded as acting in the ''interest'' of its coemployer by chilling the union activity of the employees. In these circumstances, we might preclude a seemingly ''innocent'' joint employer from reaping the ''benefits'' of its coemployer's wrongful conduct by holding the ''innocent'' joint employer vicariously liable. Such a solution is especially reasonable in the ''traditional'' joint employer relationship where each joint employer has representatives at the worksite, even if only on an occasional basis, and shares the supervision of the jointly employed employees. In these circumstances, each joint employer is in a position to hear of, inquire into, and investigate reports of its coemployer's unlawful actions. Ascribing vicarious liability to the joint employer in these circumstances requires it to undo or otherwise remedy unlawful actions of which it is in the best position to know and from which it might gain advantage.

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[10] *Wolf Trap Foundation*, 287 NLRB 1040 (1988); *Toledo World Terminals*, 289 NLRB 670, 672–673 (1988).

[11] Although Capitol excepted to the judge's joint employer finding and to the finding that its termination of Harris was unlawfully motivated, it has made no arguments to the Board regarding the propriety of holding Graham vicariously liable.

[12] Compare *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), with *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). No one contends the discharge at issue here is like the sorts of actions discussed in *Great Dane*, where the inference of motivation may be drawn from the nature of the conduct itself.

[13] E.g., *W. W. Grainger, Inc*., 286 NLRB 94 (1987), enf. denied on other grounds 860 F.2d 244 (7th Cir. 1988).

[14] *Pacemaker Driver Service*, supra; *C. R. Adams Trucking*, supra.

[15] *C. R. Adams Trucking*, supra, see fn. 8

[16] *Southern California Gas Co*., 302 NLRB 456, 462–463 (1991) (even assuming joint employer relationship, no liability for termination of janitors imputable to employer that had no connection with the termination decision); *Food & Commercial Workers (R & F Grocers)*, 267 NLRB 891, 893 fn. 7 (1983) (''joint employers are not liable for unfair labor practices committed by one of them in conducting independent operations that are not encompassed by the joint employer relationship'').

Member Raudabaugh argues that those cases are inapposite because in the present case, unlike in those, the discriminatory action—here the termination of Harris by Capitol—is *within* the scope of the joint employer relationship. But his contention that the termination decision was within the scope of that relationship depends on characterizing as a ''request'' something that was clearly a demand which Graham had no contractual basis for resisting. As noted in fns. 17 and 18 infra, this does not at all reflect the realities of the customer-supplier relationship presented here.

This is not the case, however, where one joint employer merely supplies employees to its coemployer[17] and otherwise takes no part in the daily direction of the employees, does not participate in their oversight, and has no representatives at the worksite. In this situation, joint employers are not in a position that would allow them to learn, even with the expenditure of reasonable efforts, of their coemployer's unilateral unlawful actions.[18] Consequently, in joint employer relationships in which one employer supplies employees to the other, we will find both joint employers liable for an unlawful employee termination (or other discriminatory discipline short of termination) only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it.[19]

Because a joint employer has, by definition, voluntarily shared its management of a work force with another employer, and because such employers are in the best position to produce evidence of their knowledge of a particular action taken by the other,[20] we adopt the following allocation of burdens. The General Counsel must first show (1) that two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, *if* it knew, it took all measures within its power to resist the unlawful action.[21]

Applying this standard here, we find for the reasons described by the judge that the General Counsel carried his initial burden of showing that Capitol violated Section 8(a)(3) by having Harris removed from his job at Capitol and that Capitol and Graham are joint employers.[22] Thus, the burden shifts to Graham to show that it neither knew nor should have known of Capitol's unlawful discharge of A. V. Harris.

[17] The action of Capitol, as a dissatisfied customer of a labor supplier, in terminating Harris would appear directly contrary to Graham's financial advantage. The United States Court of Appeals for the Sixth Circuit relied on a similar consideration in denying enforcement of the Board's Order holding Pacemaker jointly liable for satisfying the backpay remedy in *Carrier Corp. v. NLRB*, 768 F.2d at 783. It appears that Pacemaker challenged only the remedy and not the finding of a violation against it, so the court had no occasion to rule on that broader issue. But the court's logic would appear to support a finding that Pacemaker should not have been held liable at all for the unlawful decision by Carrier which ''caused Pacemaker to lose its only client in Knoxville,'' at least in the absence of Pacemaker's knowing involvement in Carrier's unlawful decision. Id.

[18] Contrary to our dissenting colleague, we do not agree that principles of agency law properly apply to the statutory liability issue here. But even assuming they do, we do not believe they dictate a finding that the unlawful action of Capitol must, as a matter of law, be imputed to Graham. As the section in the Restatement, on which our colleague relies, makes clear, ''members of a partnership are liable as principals . . . for the acts of a partner which are *authorized* and those which bind them because the act is within the *agency* power of the partner.'' Restatement 2d, *Agency* § 14A (1958) (emphasis added). Capitol's discrimination against Harris was not ''authorized'' by Graham, although Graham had no choice but to accept Harris' termination, because it had no power to force Capitol to retain employees Capitol did not want. Similarly, although this action was within the power of Capitol, it was not within Capitol's ''agency power,'' because Capitol was in no sense acting as an agent of Graham in refusing to retain an employee whom Graham had referred. In other words, the termination was outside the scope of the joint employer relationship. See *Southern California Gas Co*., supra; *Food & Commercial Workers (R & F Grocers)*, supra.

Member Devaney agrees with the majority that principles of agency law do not properly apply to the statutory liability issue here. Accordingly, he finds it unnecessary to reach the issue of whether, as Member Raudabaugh asserts in his dissent, Capitol's discharge of Harris was ''within the scope of the agency.''

[19] Cf. *Wolf Trap Foundation*, supra, 287 NLRB at 1041.

[20] The Board already imposes an evidentiary burden on the party with the best access to the proof of motivation in cases alleging 8(a)(3) misconduct, the respondent. See *Wright Line*, 251 NLRB 1083 at 1087–1088 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[21] To the extent that this rule is inconsistent with the holdings of *Pacemaker Driver*, supra, and *C. R. Adams Trucking*, supra, regarding the liability of joint employers for violations of Sec. 8(a)(3) and (1), we overrule them.

[22] With respect to the joint employer finding, we note that this case is distinguishable from *Flav-O-Rich, Inc*., 309 NLRB 262 (1992), in which the Board adopted a finding that an employment service (the Job Shop) and the employer to which it had supplied temporary employees (Flav-O-Rich) were not joint employers. In determining that the Job Shop was the sole employer of the temporary employees, the administrative law judge relied on his finding that Flav-O-Rich exercised no control over the employees' terms and conditions of employment beyond very limited and routine direction of their work. In the present case, by contrast, Capitol's supervision of Graham-supplied employees goes well beyond routine direction of work. Among other things, Capitol exercises the right to discipline them.

Of course, even in the absence of a joint employer relationship, an employer is properly held liable for its *own* deliberate actions that affect an individual's employment status with another employer. Thus, an employer that successfully requests the termination of an employee for discriminatory reasons violates the Act and can be required to make the employee whole for loss of pay, even if it is not that employee's employer. *Flav-O-Rich, Inc*., supra, 309 NLRB at 265–266 (liability of Flav-O-Rich). The entity acquiescing in the request would not be guilty of an unfair labor practice, however, if it were not aware of the motive behind the request. Id. at 266 (liability of Job Shop).

We are satisfied that Graham has here met this burden because the undisputed evidence shows that Capitol did not tell Graham that it was requesting Harris' removal because of his union activity and that Graham was not otherwise aware of this reason. Indeed, according to the credited testimony of the two Graham representatives contacted by Capitol regarding Harris, the *only* reasons given for Harris' removal were plausible and legitimate on their face—that Harris had not been obeying supervisors' directives or otherwise cooperating with them and that he had been found several times in the breakroom when he was supposed to be working. Further, according to Graham Manager LaDonna McGhee's credited testimony, when she recounted those nondiscriminatory reasons to Harris, he did not dispute them. Finally, there is no evidence of any information conveyed to Graham that would have put it on notice of an unlawful motive underlying Capitol's termination of Harris. That would have required Graham to check further on Capitol's reasons for requesting Harris' removal.[23] Accordingly, we conclude that Graham is not liable for Capitol's unlawful discharge of employee A. V. Harris.

Finally, as noted at the outset, the rule we have announced applies only to joint employer relationships of the kind involved here—in which one employer supplies employees to work in the business of another—and to unfair labor practices dependent on findings of unlawful motive. We leave open the possibility that a finding of vicarious liability might be appropriate in cases involving different forms of joint employer relationships and different categories of unfair labor practices.[24]

[23] If the reason given had suggested a violation, or if no reason had been given, Graham would have had the burden of presenting some evidence of its efforts to ascertain the reason for Harris' removal.

[24] In deciding this case we have not relied on case law, cited by amicus NATS, developed under statutes relating to workplace safety and the restructuring of worksites to accommodate the disabled. In our view those cases are not helpful analogues for resolving the question of vicarious liability for discriminatory employment decisions. We note that cases under Title VII of the Equal Employment Opportunity Act, 42 U.S.C. § 2000 et seq., do not support a rule of vicarious liability imposed on the basis of joint employer status alone. Thus, when two employers are shown to be a *single employer* under the Board's four-part test, an act of discrimination by one will be imputed to the other. See, e.g., *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987), and cases there cited. When two employers are separate entities, however, the courts seek to determine whether the entity seeking to escape liability exercised some control over the discriminatory act or policy (*EEOC v. Sage Realty Corp*., 87 F.R.D. 365, 371 (S.D.N.Y.1980)), or whether the two entities ''acted in concert'' to discriminate against an individual. *Trevino v. Celanese Corp*., 701 F.2d 397, 405 (5th Cir. 1983).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Capitol EMI Music, Inc., Greensboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete in its entirety the portion of the Order directed at ''The Company, Graham & Associates Temporaries, Inc., its officers, agents, successors and assigns . . . .''

2. Delete Appendix B.

MEMBER RAUDABAUGH, dissenting.

My colleagues have found that Capitol and Graham were joint employers of employee Harris. They have further found that Harris was terminated for discriminatory reasons. They impose a remedial order on one of the joint employers (Capitol), but they decline to impose any remedial order on the other (Graham). They overrule two Board decisions to reach this result. I would apply these precedents and find Graham jointly liable for the unlawful conduct.

Each of the two Companies was responsible for a significant aspect of the employment relationship. Graham hired Harris, referred him to Capitol, set Harris' wages and benefits, paid Harris, made the appropriate deductions, and paid the payroll taxes and workers' compensation. In return for these services, Capitol paid Graham a sum of money agreed on by the two Companies. Capitol directed and supervised Harris at work. Capitol could request that Graham reassign an employee, and Graham would acquiesce in that request. That is what happened in this case—Capitol asked that Harris be reassigned, and Graham acquiesced.

The joint employment of Harris was mutually beneficial to both Employers. Capitol secured the services of an employee, without being saddled with the administrative obligations and other expenses that are normally attendant to a traditional employment relationship. Graham derived a profit for its services. In a real sense, Graham hired the employee and ''loaned'' him to Capitol, in exchange for a sum of money.

As my colleagues appear to concede, the Board's case law imposes joint liability in just such joint employer situations.[1] The case law does so even if one of the joint employers is wholly innocent of the unfair labor practice committed by the other.[2]

[1] *Pacemaker Driver Service*, 269 NLRB 971 (1984), revd. in pertinent part sub nom. *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985); *C. R. Adams Trucking*, 262 NLRB 563 (1982), enfd. 718 F.2d 869 (8th Cir. 1983).

[2] Contrary to the suggestion of my colleagues, I do not suggest that Graham shared Capitol's unlawful motive. Rather I conclude

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This case law is wholly consistent with general principles of agency law. My colleagues do not quarrel with the proposition that Capitol and Graham, as joint employers, were partners in the employment of Harris. Under principles of agency law, one partner is considered to be the agent of the other.[3] As such, that partner is liable for the acts of his copartners.[4] Applying these principles to the two partners in a joint employer relationship, one joint employer is the agent of the other with respect to matters concerning their employment relationship with the employee.[5]

My colleagues seek to avoid the imposition of joint liability by asserting that the termination of Harris was not in the interests of Graham. I assume arguendo that this is so. However, the test of liability is *not* whether the act of one partner can be shown to be in the interests of the other. The test is whether the act is within the scope of the agency created by the partnership arrangement.

My colleagues contend that the termination of Harris was outside the scope of the joint employer relationship. The fact is that the termination was clearly within the scope of that relationship. Indeed, the termination was accomplished pursuant to the terms of the arrangement between the two joint employers. Under the terms of that arrangement, a termination is accomplished when one employer (Capitol) asks the other (Graham) to take the employee back. When the other employer (Graham) acquiesces, the joint employer relationship between Capitol/Graham and the employee is at an end. In these circumstances, I disagree with my colleagues that the termination was not within the scope of the joint employer relationship. To the contrary, the termination was contemplated by the arrangement between the two employers and was effectuated pursuant to that arrangement.

My colleagues assert that Capitol could *demand* of Graham that Harris be terminated. Assuming arguendo that the arrangement between Capitol and Graham was such that Capitol had the power to make such a demand, the exercise of the power would be within the scope of the arrangement and thus within the scope of the joint employer relationship.[6]

In sum, my colleagues have reversed Board precedent. Further, they have done so without cause, for such precedent is wholly consistent with traditional principles of agency and partnership law. In addition, they have diminished the Board's remedial arsenal. Many concerned observers believe that the Board should be *adding* to its remedial arsenal. Finally, they have done so in the context of a case involving the contingency work force, a growing and important area of our economy. I therefore dissent.[7]

that, under the principles discussed here, Graham can be held liable for the unlawful conduct of Capitol.

[3] Restatement 2d, *Agency* § 14A (1958).

[4] 59A Am.Jur.2d, *Partnership* § 250.

[5] In denying enforcement in *Pacemaker*, the Sixth Circuit relied on the principle that an independent contractor cannot be held responsible for the unlawful acts of the person retaining him, absent involvement or knowledge on the part of the independent contractor. I agree, but the liability here rests on principles of agency law.

[6] For these same reasons, the cases cited by my colleagues in fn. 16 of their opinion are inapposite. In *Southern California Gas Co.*, 302 NLRB 456 (1991), the termination was effectuated solely by one employer. In *Food & Commercial Workers (R & F Grocers)*, 267 NLRB 891 (1983), the Board said that a joint employer is not liable for the unlawful conduct of the other ''with respect to matters that are not encompassed by the joint employer relationship.'' As shown, the termination here was carried out within the terms of the relationship. Finally, contrary to the view of my colleagues, the Restatement supports liability here, for the termination was within the scope of the joint employer relationship.

[7] My colleagues seek to soften the impact of their holding by stating that they would impose liability on the nonacting joint employer if: (1) that employer knew or should have known of the unlawful reasons for the action of the other employer, and (2) the nonacting employer acquiesced in the action. In my experience, parties rarely proclaim the unlawful reasons for their actions. Rather, as here, they assert lawful reasons for their conduct.

Donald Gattalaro, Esq., for the General Counsel.
Don T. Carmody, Esq. (Carmody & Goldstein), of New York, New York, for Capitol EMI Music, Inc.
Martin Erwin, Esq. (Smith, Helms, Mulliss & Moore), of Greensboro, North Carolina, for Graham & Associates Temporaries, Inc.
R. W. Brown, Business Agent, of Kernersville, North Carolina, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. Chauffeurs, Teamsters and Helpers Local 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO (the Union) filed unfair labor practice charges against Capitol EMI Music, Inc. (Capitol), in Cases 11–CA–14106, 11–CA–14152, and 11–CA–14300 on October 29, 1990,[1] November 27, 1990, and March 8, 1990, respectively.[2] The Union also charged Graham & Associates Temporaries, Inc. (Graham), with unfair labor practices in Case 11–CA–14152. After investigating, the Regional Director for Region 11, as an agent of the Board's General Counsel, issued a second order consolidating cases, consolidated complaint and notice of hearing (the complaint), on March 22, 1991. I heard the cases in trial on April 8, 9, 10, and 11, 1991.

In substance, the complaint alleges that Capitol and Graham are joint employers of certain temporary employees provided by Graham to Capitol at the latter's Greensboro, North Carolina facility.[3] It is also alleged that Capitol, through certain of its agents and supervisors, engaged in various acts

[1] All dates are 1990 unless I specify otherwise.

[2] All of the charges were, at various times thereafter, amended. I find it unnecessary to set forth dates of the various amendments.

[3] Although Capitol has other locations, the Greensboro facility is the only facility involved herein.

that interfered with, restrained, and coerced its employees in the exercise of rights guaranteed them by Section 7 of the National Labor Relations Act.[4] It is further alleged that Capitol and Graham violated Section 8(a)(3) of the Act in discharging employee Anthony V. Harris (A. V. Harris), on or about October 22. It is further alleged that since on or about August 17, a majority of Capitol's employees in an appropriate unit[5] selected the Union as their collective-bargaining representative and that since that date the Union has requested, and continues to request, Capitol to recognize and bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment of the unit employees. It is alleged Capitol has, since on or about August 22, refused to recognize and bargain with the Union in that it, on or about January 19, 1991, unilaterally, without notice to or bargaining with the Union, (1) distributed an employee handbook that affected wages, hours, and working conditions; (2) altered its past practice regarding the awarding of jobs; (3) altered its past practice regarding attendance; (4) instituted a ''Levels of Discipline'' policy; (5) instituted a peer review process; (6) instituted a layoff and recall policy; (7) established three new paid holidays; (8) instituted a time-off policy; and, (9) established production quotas in violation of Section 8(a)(5) of the Act. It is asserted in the complaint that Capitol's acts and conduct alleged to be in violation of Section 8(a)(1) and (3) of the Act are so serious and substantial in character that the possibility of erasing the effects of these alleged unfair labor practices and of conducting a fair rerun election by the use of traditional remedies is slight and that employee sentiments regarding representation, having been expressed through authorization cards, would, on balance, be better protected by issuance of a bargaining order.

In a second report on objections and challenges and third order consolidating cases, the Regional Director for Region 11, on April 5, 1991, consolidated certain of the Union's (Petitioner's) objections to conduct affecting the results of the election (held on October 12) in Case 11–RC–5723 with the above-referenced unfair labor practice cases.

Capitol and Graham timely filed answers to the complaint in which they admitted certain allegations but denied they are joint employers or that they committed any wrongdoings.

I have carefully reviewed the trial record and have studied the posttrial briefs filed by counsel for the General Counsel, Capitol, and Graham. I have been influenced by my assessments of the witnesses as they testified. Based on the above, and as explained below, I find Capitol and Graham to be joint employers of certain temporary employees utilized at Capitol and that they violated the Act substantially as outlined in the complaint. Accordingly, I have recommended certain remedial action, including, among other things, the posting of notices, the reinstatement with backpay of A. V. Harris, and that Capitol bargain in good faith with the Union regarding wages and other terms and conditions of employment of the employees in the above-described unit.

[4] The specific allegations are set forth elsewhere in this Decision.

[5] The unit description is:

> All regular full-time warehouse employees, including promotions department, computer department, order department, and shipping and receiving department, and group leaders employed at the Respondent Capitol's Beechwood Drive, Greensboro, North Carolina, facility; excluding all other employees, office clerical employees, and guards and supervisors as defined in the Act.

FINDINGS OF FACT

I. JURISDICTION

Capitol is, and at material times herein has been, a Delaware corporation with a facility located at Greensboro, North Carolina, where it is engaged in the distribution of records, compact discs, and vinyl recordings to retail and intracompany facilities. During the 12 months preceding issuance of the complaint, Capitol sold and shipped products valued in excess of $50,000 from its Greensboro facility directly to points outside the State of North Carolina. The complaint alleges, the parties admit, and I find, Capitol is, and at times material herein has been, an employer engaged in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Graham is, and at material times herein has been, a North Carolina corporation with a facility located at Greensboro, North Carolina, where it is engaged in the operation of an employment agency. During the 12 months preceding issuance of the complaint herein, Graham, in the course of its business operations, provided services valued in excess of $50,000 to enterprises in the State of North Carolina, including Capitol, which, as noted above, is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint alleges, the parties admit, and I find, Graham is, and at times material herein has been, an employer engaged in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the parties admit, the evidence establishes, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Overview*[6]

Capitol operates its business utilizing its own permanent employees as well as some temporary employees that were hired by Graham and assigned to Capitol by Graham.[7] Capitol is free at any time to hire any or all of the temporary employees Graham assigns to it.

On or about August 12, Capitol employee Kevin Cummings (Cummings) and approximately 15 fellow workers decided to seek help from a union. On or about August 13, employees Dale Walen, Thomas Kent Brown (T. K. Brown), and Cummings met with Union Business Agent Rubin William Brown (R. W. Brown or Business Agent Brown). Business Agent Brown provided union membership cards to the employees and told them if they could secure a 70-percent showing of interest, the Union would demand recognition from Capitol and if Capitol refused, the Union would file a representation petition with the Board to seek a Board-conducted election. On August 15, certain employ-

[6] The facts set forth in this overview are either admitted, uncontradicted, or stipulated.

[7] The relationship between Capitol and Graham is detailed elsewhere in this decision.

ees began soliciting their fellow workers to sign union membership cards. After completing work on the first shift on August 16, Cummings and other employees took some 50-plus signed union membership cards to the union hall.[8] On August 17, Union Business Agent Brown demanded in writing that Capitol recognize and bargain with the Union as the representative of its unit employees. Capitol admits receiving the demand letter on August 20, and thereafter denied the Union's request. On August 20, Business Agent Brown conducted a union meeting for Capitol employees at which approximately 40 such employees signed initial union membership cards or signed a second such card. Also on August 20, the Union filed a representation petition in Case 11–RC–5723.

Pursuant to a stipulated election agreement approved on September 13, the Board held a secret ballot election at Capitol on October 12 with the following results.[9]

Approximate number of eligible voters:	97
Number of void ballots:	0
Number of votes cast for Petitioner:	36
Number of votes cast against Petitioner:	38
Number of valid votes counted:	74
Number of challenged ballots:	20
Number of valid votes counted plus challenged ballots:	94

On October 18, the Union (Petitioner) filed timely objections to conduct affecting the results of the election. After an investigation, the Regional Director for Region 11 issued his report on objections and challenges recommending that 17 of the challenged ballots be sustained[10] and that the three remaining determinative challenged ballots be opened and counted.[11] In his report, the Regional Director also concluded that 10[12] of the 17[13] objections raised by the Union (Petitioner) were coextensive with issues in Case 11–CA–14106 in which he had issued a complaint on December 4. Accordingly, the Regional Director recommended the three challenged ballots in question be opened and counted and if the revised tally of ballots showed the Union (Petitioner) had received a majority of the valid votes cast, a certification of representative should issue; however, if the Union (Petitioner) did not receive a majority of the valid votes counted, then the Union's (Petitioner's) objections should be consolidated with Case 11–CA–14106 for trial.

On or about January 3, 1991, Capitol filed with the Board exceptions to the Regional Director's report. On April 2, 1991, the Board, in an unpublished Decision and Order, adopted the Regional Director's report. On April 5, 1991, following an opening and counting of the 3 challenged ballots referenced above, a revised tally of ballots was issued which shows that 36 votes were cast for the Union (Petitioner) with 41 votes cast against the Union (Petitioner). On April 5, 1991, the Regional Director for Region 11 issued a second report on objections and challenges and third order consolidating cases in which he consolidated the Union's (Petitioner's) pertinent objections with the complaint. The Regional Director's second report was served upon Capitol at the commencement of the trial herein.[14]

The chronology of the representation and related unfair labor practice cases has been detailed to the above extent because Capitol, at trial and at length in its posttrial brief, argues it has been denied due process and equal protection of the law[15] by the General Counsel issuing a complaint in the unfair labor practice cases (in which it is noted a bargaining order remedy would be sought) prior to counting the determinative challenged ballots in the representation case.

Capitol's lengthy contentions appear to be that it was unfairly subjected to having to choose between expending

[8] Other activities that took place on August 15 and 16 at Capitol that are intertwined with or impact on the above facts are detailed elsewhere in this decision. The facts set forth above are simply intended to be a general overview.

[9] Counsel for the General Counsel in his posttrial brief moved to have the original report on objections and challenges received in evidence as G.C. Exh. 1(jj). I hereby grant his unopposed motion.

[10] The Regional Director recommended the challenge to the ballots of the following 17 individuals be sustained on the basis they commenced working at Capitol 1 day after the eligibility cutoff date: Tonya Winston, Linda K. Jones, Marcus Marcellus, Anthony Okoro, Dawn Stewart, Maxine Cannady, Regina McCormick, Peggy King, Florita Atkins, Anthony Brown, Derek Wilson, Belinda Cottingham, Shelia Nicholson Lee, Sophia Jones, Jeannett Bass, Aaron McKinney, and Charles Blackstock.

[11] The three the Director recommended be opened and counted were Sandra Thomasson, Yolanda Joyner, and Mark Schiavone.

[12] Objections 1, 2, 3, 5, 6, 7, 9, 10, 12, and 13 allege, inter alia, that Capitol ''threatened its employees that it would bargain from zero'' if they selected the Union as their collective-bargaining representative; created the impression among its employees that it would be futile for them to select the Union as their collective-bargaining representative; threatened its employees with loss of wages and benefits if they selected the Union as their collective-bargaining representative; interrogated its employees concerning their union activities, sympathies, and desires; threatened its employees with discharge because of their union activities; created among its employees the impression that their union activities were under surveillance; engaged in surveillance and recorded, by means of video camera and recorder, its employees while they were engaged in union activities with union officials; promulgated and threatened to enforce a ''no-talking'' rule in the work area in order to dissuade employees from engaging in union activity; threatened its employees with unspecified reprisals for engaging in union activity; interfered with its employees' right to freely engage in union activity by more closely monitoring their work activity; and, promised to remedy its employees' grievances in an effort to discourage union activity.

[13] The Union (Petitioner) withdrew Objections 4, 8, 11, 14, 15, and 16, and the Regional Director recommended that Objection 17 be overruled.

[14] Capitol asserts it filed exceptions to the Regional Director's Second report on April 18, 1991, and further asserts its exceptions are currently pending before the Board.

[15] Capitol also asserts the same actions by counsel for the General Counsel constitute ''rulemaking'' without compliance with the Administrative Procedures Act.

funds to prepare its defense to the unfair labor practice allegations, which allegations might have changed after the challenged ballots were counted, and doing nothing in the way of preparation until it saw exactly what it was up against.[16] Stated differently, Capitol argues it did not know until the challenged ballots were opened on Friday before trial commenced on Monday ''whether it would actually be necessary to defend the *Gissel* allegations in the complaint.''

Capitol's constitutional and/or Administrative Procedures Act defenses are without merit. First, the *Gissel*[17]-type complaint paragraph does not add unfair labor practice allegations against Capitol, it simply places Capitol and all parties on notice that the General Counsel will seek a specific remedy for the unfair labor practice allegations already set forth in the complaint. Second, the unfair labor practice allegations had been set forth for an extended time prior to trial of the instant case. Thus, Capitol can hardly be heard to complain it did not know what it might be called upon to defend against. Third, even if the Union (Petitioner) had won the election, there is nothing beyond mere speculation to indicate that counsel for the General Counsel would have altered the unfair labor practice allegations of the complaint in any manner as a result thereof. While it is true that if the Union (Petitioner) had won the election after the three challenged ballots were opened and counted, a certification would have issued and counsel for the General Counsel would not have sought a *Gissel* bargaining order remedy. However, such changes would not have placed counsel for the General Counsel in the position of having to change any of the unfair labor practice allegations already set forth in the complaint. I am persuaded Capitol was on notice regarding what it needed to defend against and its choice to follow the course of action it did was a risk it knowingly took and as such it was not denied due process or equal protection under the law. Nor did any of the General Counsel's actions herein constitute rulemaking.

B. *The Alleged 8(a)(1) Violations*

I shall treat the 8(a)(1) allegations against Capitol on a supervisor-by-supervisor basis.

1. Alleged violations attributed to Warehouse Supervisor Mike Kirk

a. *Interrogation*

It is alleged at paragraph 13(e) of the complaint that Warehouse Supervisor Kirk on or about late August, early to mid-September, and October 12, interrogated employees concerning their union activities, sympathies, and desires.

Employee Sherry Ratliff, who works as a ''bolt rigger'' under the supervision of Don McLean, testified that in August, Supervisor Kirk approached her in the warehouse and ''asked me why I felt I needed a union and . . . why I felt . . . we needed a union.''[18] Ratliff said that although she at a later time openly supported the Union, she had not done so at the time Kirk spoke with her.

Bulk picker Mary Sue Potts testified Supervisor Kirk asked her in mid-September ''what [she] thought about a union and what it could do for the Company, for the employees there.'' Potts told Kirk she ''didn't have any idea what a union could do'' and added ''[a]ll [she] knew was that the management hadn't shown [the employees] anything.'' According to Potts, Kirk said he had been in a union at a previous job and a ''union wouldn't do us any good.'' Potts said she had not openly supported the union at the time of this conversation with Kirk.

Former employee Frederick Townsend testified that in the warehouse in October, Supervisor Kirk ''asked me how I intend[ed] to vote and how would I pay union dues.'' Townsend told Kirk he was neutral on the union matter. Townsend said Kirk then ''told me . . . he knew anybody that was voting for the Union except . . . the last two people . . . or something like that.''

Supervisor Kirk was not called as a witness nor was his absence adequately explained.[19]

I find no basis to discredit the undisputed testimony of employees Ratliff and Potts, and former employee Townsend regarding Supervisor Kirk's various conversations with them as outlined above. Accordingly, I credit the above-outlined testimony.

I shall review the allegations of interrogation that are based on the above-credited testimony in light of the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Rossmore House*, the Board held the lawfulness of questioning by employer agents about union sympathies and activities turns on the question of whether ''under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act.'' The Board in *Rossmore House* noted the *Bourne*[20] test was helpful in making such an analysis. The *Bourne* test factors are as follows:

> (1) The background, i.e., is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e., how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of ''unnatural formality''?
>
> (5) Truthfulness of the reply.[21]

[16] In its posttrial brief, Capitol states ''the record shows that Capitol did not undertake the preparation of a defense of the *Gissel* complaint before the challenged ballot count. Having made the decision that it could not lawfully be put in the position by the Board of having to defend itself against a complaint which might never come to fruition.''

[17] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[18] According to Ratliff, Kirk made other comments that are covered elsewhere in this decision.

[19] Kirk was no longer employed by Capitol at the time of the trial herein; however, it appears he was still in the general area. Capitol's counsel stated he had spoken with, and subpoenaed, Kirk but that Kirk was ''reluctant'' to come to court other than at a time convenient to himself.

[20] *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

[21] The *Bourne* test has been cited with approval by various circuits. For a partial listing of those circuits, see *Teamsters Local 633 v. NLRB*, 509 F.2d 490 fn. 15 (D.C. Cir. 1974).

Kirk, at material times herein, was the management representative in charge of warehouse operations. In his conversation with employee Ratliff, Kirk not only asked about her union sympathies but also about the union sentiments of other employees. Kirk did not assure Ratliff that Capitol would not take any adverse actions against her or the other employees regardless of her answers or even whether she answered at all. As will be hereinafter more fully set forth, Kirk made other comments in his conversations with Ratliff that I find violated the Act. Kirk advanced no valid reason to Ratliff or others for his inquiries. When employee Potts responded to Kirk's inquiry about what a union could do for her or the other employees, Kirk told her he knew from experience the Union would not do the employees any good. Kirk did not suggest to Potts any valid reason for his questions. I note that neither Ratliff nor Potts had openly expressed or demonstrated their union sentiments at the time Kirk interrogated them. When Kirk questioned former employee Townsend before the Board-conducted election regarding how he was going to vote, Kirk did not express to Townsend any valid reason for his inquiry.

In light of all the above, I find Capitol, through its supervisor and agent, Kirk, violated Section 8(a)(1) of the Act as alleged at paragraph 13(e) of the complaint.

b. *Impression of surveillance*

It is alleged at paragraph 13(g) of the complaint that Supervisor Kirk, on or about September 11 and 12, and October 12, created among employees the impression their union activities were under surveillance.

Employee Cheryl Cole (Cole) testified without contradiction that Supervisor Kirk approached her and employees Shelia Pemberton and Angela Dumas in their work area on September 11, and ''said that the Company would know how the employees voted in the union, . . . they would know whether they went yes or no'' and then walked away. Cole further testified, without contradiction, that the following day, September 12, Kirk approached her and employees Tabitha Stilwell, Felicia Green, Eleanor Austin, and Randy Jones and stated ''the Company would know how each employee voted in the election, whether they voted yes or no'' and again walked away.

As noted elsewhere in this decision, Supervisor Kirk asked employee Townsend in October how he intended to vote in the election and how he would pay union dues. Townsend testified, without contradiction, Kirk also told him in the same conversation that ''he knew how many people—he knew any body that was voting for the union except two.''

Kirk's above-outlined comments that Capitol knew how many employees would be voting for the Union (with two possible exceptions) in the election clearly conveyed the impression and employees could reasonably assume that their union activities were under surveillance. Such statements violate Section 8(a)(1) of the Act and I so find. Cf. *Keystone Lamp Mfg. Corp*., 284 NLRB 626 at 627 (1987).

c. *The no-talking rule and more closely monitoring employees*

It is alleged at paragraph 13(i) of the complaint that Supervisor Kirk promulgated a rule prohibiting employees from engaging in conversations in their work areas in an effort to dissuade them from engaging in union activities. It is further alleged at paragraph 13(k) of the complaint that Kirk interfered with employees' attempts to engage in union activity by more closely monitoring their work.

Employee Potts testified that prior to the advent of the Union, the employees ''could talk and work together.'' In fact, she said it was essential for employees to speak with each other in order to effectively perform their job assignments as ''bulk pickers.'' Bulk pickers assemble orders of records and tapes and in locating such they share a single computer. Potts testified employees could accomplish their tasks quicker simply by asking each other where stock was located rather than waiting in line to use the one warehouse computer. Potts said that after the Union came on the scene, Supervisor Kirk, among other supervisors, told them not to talk and contrary to past practice followed the bulk pickers as they performed their tasks. Potts said Supervisor Kirk asked the ''bulk pickers'' what they were talking about each time they stopped and then ordered them back to work. Potts said that prior to the union campaign, she seldom, if ever, saw Kirk in the aisles of the warehouse but after the union campaign started he appeared every time a bulk picker stopped. Potts said Kirk told her ''[i]f we were talking about the union, we would be terminated.''

Employee Ratliff testified that prior to the union campaign, Capitol did not ''like us to talk to each other that much'' but that no employees had ever been disciplined for doing so. She testified that about 1 week before the Board-conducted election, Supervisor Kirk told her ''not to be talking to anyone'' that she was ''harassing people into the union'' and that she would be disciplined if she didn't stop doing so. Ratliff stated that prior to the union campaign, they ''didn't see the supervisors at all'' but that after the campaign got underway they saw the supervisors ''[a]ll the time.''

Employee Dumas testified that prior to the union campaign, the Company had no rule regarding employees talking as they worked.

I am persuaded that Capitol, through Supervisor Kirk and others, promulgated a rule prohibiting conversations between employees in the work areas in order to dissuade them from engaging in union activities rather than to maintain production or discipline. The prohibition coincided with the advent of union activities and there was no showing that the long practice of allowing employees to talk to each other had suddenly become a disciplinary problem. Furthermore, the only focus of Supervisor Kirk's enforcement of the rule was against union activities. The Board has long held that rules or restrictions violate the Act when such are promulgated to interfere with employees' rights to self-organization rather than to maintain production or discipline. See, e.g., *Horton Automatics*, 289 NLRB 405 at 409 (1988).

I further conclude Capitol, through Supervisor Kirk, unlawfully interfered with its employees union activities by more closely monitoring its employees' work activities. As testified to by employees Ratliff and Potts, supervisors were seldom seen in the warehouse aisles before the advent of the Union but after that time supervisors were seen in the aisles ''all the time.'' That this extra monitoring was aimed at the employees' union activities is demonstrated, for example, by the fact employees who were observed talking as a result of the extra monitoring were asked if they were talking about

the Union and were told they would be terminated or disciplined for doing so.

d. *Threat of discharge*

It is alleged at paragraph 13(f) of the complaint that Supervisor Kirk, on or about September 15, threatened employees with discharge because of their union activities.

Forklift operator Cummings, one of the employees that initially contacted the Union and secured many of the union membership cards, testified that in October Kirk approached him on the only occasion that he wore a union T-shirt and said ''even if the Union does win the election or the Union does get in, that he and the Company would still have the power or right to see who stays and leaves.'' I credit Cummings' uncontradicted testimony.

Kirk's comments to known union activist Cummings in the midst of the union campaign that even if the campaign was successful, the Company would still decide who stayed as employees or who lost their employment constitutes an unlawful threat to discharge employees for their union activities and I so find.

e. *Alleged promise to remedy grievances*

It is alleged at paragraph 13(l) of the complaint that Supervisor Kirk promised to remedy employees' grievances in an effort to discourage their union activities.

As noted elsewhere in this decision, Supervisor Kirk asked employee Ratliff, in August, why she as well as other employees ''needed a union'' and then told her ''he thought the Company could make things better'' and asked ''what [she] thought would help the situation'' and ''that if [she] had any questions, he would be willing to sit down and talk with [her] one on one.''

I am persuaded, in agreement with counsel for the General Counsel, that in the context of unlawfully interrogating Ratliff, Kirk also sought to have her identify problems and/or grievances she or other employees might have with the Company, real or perceived, and then stated he thought Capitol could make things better. Kirk even offered to make himself available one on one for Ratliff to identify what she (or others) thought would improve things at Capitol.

Absent a previous practice of doing so (no such practice was established herein) the solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act. I note it is the promise, expressed or implied, to remedy the grievances that constitutes the essence of the violation. I further note that the solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. Although the inference that an employer is going to remedy the same when it solicits grievances in a preelection setting is a rebuttable one, nothing was offered in the instant case on which to base any such rebuttal. Accordingly, I am persuaded Kirk's remarks to Ratliff, as outlined above violated Section 8(a)(1) of the Act. See *Columbus Mills, Inc*., 303 NLRB 223, 227–228 (1991), and the cases cited therein.

2. Alleged violations attributed to Shipping, Receiving and Traffic Supervisor Michael Gordon

a. *Alleged threats of a loss of wages and benefits and of advising employees it would be futile for them to select the Union as their collective-bargaining representative*

It is alleged at paragraphs 13(a) and (b) of the complaint that, on or about early September and October, Supervisor Gordon threatened employees with loss of wages and benefits if they selected the Union as their collective-bargaining representative by informing employees bargaining would start from zero and advising employees it would be futile for them to select the Union as their collective-bargaining representative.

Warehouse employee Anthony M. Harris (A. M. Harris) testified he and fellow employee T. K. Brown had a conversation with Supervisor Gordon in Gordon's office in early September. Harris testified Gordon said:

> that negotiations would start at ground zero, move to minimum wage, and then it would go to what we were making now and then they wouldn't bargain in good faith any more.

On cross-examination, Harris testified Gordon said Capitol ''would just sit back and say no'' when asked to negotiate wages in excess of the hourly wage ($6.75) paid before the union campaign started. Harris testified Gordon said ''after [Capitol] reached the $6.75 mark . . . they would not go any higher than that.''

Employee T. K. Brown testified A. M. Harris asked Gordon about negotiations if the union represented the employees. Brown testified Gordon said all Capitol ''had to do was keep saying no, no, no[22] . . . and could just keep putting it off by saying that.'' Brown further testified Gordon said negotiations would ''begin at zero.''

Shipping, Receiving, and Traffic Supervisor Gordon denied telling A. M. Harris and/or T. K. Brown that zero meant there would be no wages and that negotiations would move up to minimum wage and then up to the wages they were earning but that Capitol would not thereafter bargain in good faith. Gordon further testified in part on direct examination as follows:

> I had a conversation with Anthony Harris and Thomas K. Brown in my office about wages and benefits. The reference that I used when I said—when I talked to them about bargaining from zero was a reference from the Bendix case[23] which we had been given to in one of our presentations. I also spoke with them about—that the Company would bargain in good faith.

Gordon further testified:

> I remember explaining to them that there was a letter presented to the Bendix company and that it was said that in the letter that on negotiations because everything was negotiated, salary, wages and benefits—that all

[22] On cross-examination, Brown stated Gordon said Capitol *could* say no, no, no.

[23] It appears from Capitol Exh. 13 that Gordon was referring to *Bendix Corp. v. NLRB*, 400 F.2d 141 (6th Cir. 1968).

items were to be negotiated which meant that they started at zero which is what the letter said.

On cross-examination, Gordon acknowledged he didn't have any ''documents'' with him when he spoke with Harris and Brown and he said he had not memorized the content of the *Bendix* case. Gordon then explained his understanding of the *Bendix* case as follows:

> Basically from what I understand it was to be a landmark case that referenced using the starting from zero bargaining.
> . . . .
> Basically saying that if you start . . . if you bargain, wages, benefits, and salary that you're starting from nothing.

In view of Gordon's demeanor, I am persuaded all his testimony must be carefully examined to see if it is supported by any other means. With regard to his testimony about the A. M. Harris/T. K. Brown meeting, I note that from his direct testimony, it could be concluded he may have attempted, as he asserts he did, to explain the *Bendix* case. However, when asked on cross-examination if he had and/or used any notes in that meeting (he had not) and then asked to state his understanding of the *Bendix* case, his stated understanding persuades me his comments at the meeting were as testified to by Harris and Brown. Both Harris and Brown appeared generally candid and impressed me as attempting to testify truthfully. Accordingly, I credit their versions of Gordon's comments.

The Board, for an extended period, has been dealing with the ''bargaining from zero [scratch, nothing, clean sheet of paper, etc.]'' type explanations of the give and take in the collective-bargaining process. As Administrative Law Judge Michael O. Miller noted in *Shaw's Supermarkets*, 289 NLRB 844 at 848 (1988):

> Of such statements, the Board has held:
>
> > As the Board and the courts have recognized in other cases, in the course of organizational campaigns, statements are sometimes made of a kind that may or may not be coercive, depending on the context in which they are uttered [fn. omitted.] ''Bargaining from scratch'' is such a statement. In order to derive the true import of these remarks, it is necessary to view the context in which they are made.
>
> *Wagner Industrial Products Co.*, 170 NLRB 1413 (1968). See also *Campbell Soup Co.*, 225 NLRB 222, 229 (1976), and cases cited therein. Statements that ''accurately reflect the obligations and possibilities of the bargaining process . . . which do not contain any threats that Respondent will not bargain in good faith or that only regressive proposals will result'' will not be found violative. *Clark Equipment Co.*, 278 NLRB 498 (1986). Statements that ''effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the Employer to restore'' are objectionable (and violative of Sec. 8(a)(1)), *Plastronics*, 233 NLRB 155, 156 (1977), and cases cited therein; *Belcher Towing Co.*, 265 NLRB 1258, 1268 (1982).

I am persuaded Supervisor Gordon's remarks exceeded mere expressions of opinion as to the natural and normal hazards of collective bargaining. The clear import of Gordon's comments appears to be that Capitol would start negotiating wages only after current wages were eliminated and would only negotiate back to the level of pay employees already enjoyed prior to negotiations and would, at that point, cease to bargain in good faith. I find Supervisor Gordon's remarks to A. M. Harris and T. K. Brown in early September violated Section 8(a)(1) of the Act. See *Shaw's Supermarkets*, supra at fn. 3.

b. *Interrogation*

It is alleged at paragraph 13(e) of the complaint that Supervisor Gordon, on or about October 12, interrogated employees concerning their union activities, sympathies, and desires.[24]

Former employee Townsend testified that on October 12, the day of the Board-conducted election, Supervisor Gordon handed out ''Vote No'' buttons. Townsend said Gordon asked how he intended to vote in the election. Townsend responded he was neutral. Thereupon, Supervisor Gordon offered Townsend a ''Vote No'' button which Townsend refused.

Supervisor Gordon was not questioned specifically about this conversation but he denied ever asking any employee how they intended to vote in the union election. Gordon stated that in management meetings, he had been told he could not interrogate employees about their union sentiments.

I credit Townsend's above-outlined testimony.

I conclude the above set forth interrogation was coercive and, as such, violated Section 8(a)(1) of the Act. The questioning took place on the very day of the Board-conducted election and was undertaken by the head of shipping and receiving. No valid purpose was expressed to Townsend for the questioning. Gordon did not give Townsend any assurance against reprisals if he supported the Union. Finally, as noted throughout this decision, Gordon engaged in various unlawful acts.

3. Alleged violations attributed to Human Resources Manager Rich Garrison

It is alleged at paragraphs 13(a), (b), and (c) of the complaint that Capitol, through its supervisor and agent, Garrison, in early October threatened employees with loss of wages and benefits by informing them that if they selected the Union as their collective-bargaining representative, bargaining would start from zero and such action on their part would be futile.

Employee Rita Niles testified she attended a group meeting conducted by Manager Garrison and Supervisor Gordon. Niles testified:

> Rich Garrison told us that they would bargain in good faith, but they would not deal with the Union. He also told us that bargaining would start from zero which

[24] The remaining 8(a)(1) allegations involving Supervisor Gordon will be addressed in the portion of this decision related to the discharge of employee A. V. Harris.

> would include—we could lose our wages that we currently had; we could lose benefits that we had and benefits the Company provided.

Niles testified slides were shown at the meeting but not at the time Garrison made the above comments and she added he was not reading from a script.

On cross-examination, Niles was questioned about whether anyone asked Garrison what he meant by saying Capitol would bargain in good faith but would not deal with the Union. Although Niles could not recall who did so, she said Garrison was asked ''how come [Capitol] would not deal with the Union.'' Niles said there was total silence to that question.

Employee Ratliff testified that she, along with approximately 15 other employees, attended an employee group meeting in October and that Manager Garrison ''started the meeting off and told us that we were all starting at zero and that everything was negotiable, the insurance benefits, everything was on the line.'' Ratliff said Garrison also ''told us that [Capitol] wouldn't negotiate with us so we would have to go on strike and when we did we would be replaced.'' When asked on cross-examination exactly what Garrison told the employees about bargaining at zero, Ratliff testified Garrison said ''if we brought in the Union, we would start at zero.'' She further testified:

> He told us that we were starting at zero, ground zero, which means that we would have nothing; everything would be wiped away and we would start new, including insurance and all benefits.

Ratliff testified Garrison was not referring to a script nor showing slides at the time he talked with the employees.

Employee Potts testified she attended an employee meeting held in early October that was conducted by Garrison and Distribution Center Manager Charles Alexander. Potts testified:

> They was talking about the bargaining . . . that if they had to bargain or negotiate with the Union, that they would have to listen, but they didn't have to bargain, and if they did that everything would start from zero.[25]

Employee T. K. Brown testified he attended an employee group meeting around the first of October along with 8 to 10 other employees and that Manager Garrison ''told us that negotiations with the Union would start at zero.'' Brown further testified ''the question was asked[26] if zero bargaining meant zero as in what we have now or as in nothing and Richard Garrison's statement was zero or nothing.''[27]

Employee Cummings said he attended an employee meeting along with approximately six or seven other employees in October at which Manager Garrison and Supervisor Gordon presided. Cummings testified ''they said that wages — as far as wages were concerned, bargaining or whatever would start out at zero and we would be—it would start from there, we could be making less.'' Cummings testified he at that point asked Supervisor Gordon ''are you sure that bargaining starts at zero, and [Gordon] said, yes.'' Cummings further testified they said Capitol would bargain in good faith ''but they wouldn't have to agree to anything and that bargaining could go on for a long time.'' Cummings testified that neither Supervisor Gordon nor Manager Garrison read from a script when they talked about bargaining. Cummings also said that when they told the employees bargaining would start at zero and that they could be making less, they did not mention anything about the possibility that employees could be making more.

Employee Dumas testified she attended three employee group meetings at which management discussed the Union. She said the meetings took place in late September or early October. Dumas testified:

> They discussed what the Union could do or did we know what the Union could do for us and . . . that . . . if the Union was to come in and . . . the Union called a strike that we would have to go and if it was to go anywhere that bargaining would start at zero.

Dumas was not asked, nor did she voluntarily identify, who ''they'' of management were.

Employee A. M. Harris testified he attended an employee group meeting in October at which Manager Garrison ''said that bargaining would start at zero.'' Harris said he asked Garrison, ''do you mean zero as in no money?'' According to Harris, Garrison responded, ''no, that zero meant that everything that we had was frozen, that the $6.75—they would have to start negotiating at $6.75.''

Former employee Townsend testified he attended an employee meeting in October 1990, at which Garrison said that at the bargaining table ''everything would begin at ground zero.'' Townsend said Garrison also stated the employees ''didn't need a third party and that we would lose—that we could lose what we already had.''

Employee Cole testified she attended an employee group meeting on October 10, and that Manager Garrison said that ''if we were to win the election and the Union was in the Company . . . that didn't necessarily mean that our wages and benefits would increase and that we would negotiate at zero.''

Human Resources Manager Garrison testified Capitol managers were supplied ''prepared'' training materials[28] by a ''management consulting firm'' but that they only used ''bits and pieces'' of the materials ''at different times.'' Garrison denied telling employees at any point in October they would lose wages or benefits if they selected the Union as their collective-bargaining representative. Garrison also denied telling employees in October that it would be futile for them to choose the Union as their collective-bargaining representative.

Notwithstanding Garrison's denials, I am persuaded the witnesses called by counsel for the General Counsel testified truthfully. While the campaign materials provided to Capitol managers, including Garrison, do not appear to contain instructions, suggestions, or statements that fall outside the protection of Section 8(c) of the Act such does not establish Garrison did not make unlawful coercive statements to em-

[25] Potts testified slides were not shown at the time these comments were made.

[26] Brown could not recall which employee asked the question.

[27] Brown stated no slides were shown during this employee meeting.

[28] The materials were made a part of the record herein as Capitol Exhs. 12 and 13.

ployees at group meetings. In that regard, I noted the credited testimony establishes Garrison did not read from any prepared materials when he made the comments attributed to him. Furthermore, the fact some of counsel for the General Counsel's witnesses did not testify to coercive statements at the meeting they attended does not alter my conclusion that he did so at other employee group meetings.

It is clear the comments Garrison made at the meeting Ratliff attended were coercive and unlawful. Garrison told that group of employees bargaining would start at zero and that meant the employees ''would have nothing,'' ''everything would be wiped away,'' ''including insurance and all benefits.'' Clearly, Garrison threatened the employees with loss of their existing benefits and left the employees with the impression all they could hope to ultimately receive would depend upon what the Union could induce Capitol to restore. Garrison told employees Capitol ''wouldn't negotiate'' and they would have to go on strike and be replaced. The clear import of his comments was that it would be futile for the employees to select the Union as their collective-bargaining representative inasmuch as Capitol would not negotiate with their selected representative.

The statements Garrison made at the employee group meeting Potts attended were also coercive and unlawful. At that meeting, Garrison threatened Capitol might be forced to go to the bargaining table where ''they would have to listen'' but ''they didn't have to bargain and that everything would start from zero.'' These bargaining from zero comments of Garrison, when coupled with his other threats of futility and/or threats not to bargain at all, take on a coercive nature and as such violate the Act.

At the employee meeting attended by some 8 to 10 employees, including T. K. Brown, Garrison was asked what he meant when he said negotiations would start at zero. Garrison told the employees it did not mean starting with what they had but rather meant starting with nothing at all. Such comments constitute a threat not to bargain in good faith but rather to engage in regressive bargaining.

Garrison's comments at the group meeting attended by, among others, Cummings were coercive. Garrison told that group not only that bargaining would start at zero of which he was sure but that Capitol wouldn't have to agree to anything and that bargaining could go on for a long time. The overall tenor of his comments suggests he was not attempting to explain the facts of industrial life and bargaining but rather to leave the impression the employees would lose by choosing the Union as their collective-bargaining representative and that bargaining with Capitol would be a time consuming futile act.

Garrison's comments at the employee group meeting attended by former employee Townsend were also coercive. In context, Garrison told the employees that in bargaining, ''everything would begin at ground zero'' that the employees ''didn't need a third party'' and they ''would'' ''could'' lose what they already had. Such comments leave the impression the Company would engage in regressive bargaining.

It does not appear, based on the testimony of Niles, A. M. Harris, and Cole,[29] that Garrison made coercive comments to the employees at the group meetings these employees attended. Such conclusion does not impact on my findings that Garrison did in fact make unlawful coercive statements at other such meetings. In this regard, I note Garrison did not use notes or follow a script and as such I find it very probable and believable that he did not make the exact same comments at each of the many employee group meetings he conducted.

[29] The record does not establish that the comments testified to by employee Dumas about the group meeting she attended were made by Human Resources Manager Garrison.

4. Alleged violations attributed to Distribution Center Manager Charles Alexander

a. *No-talking rule and related threats*

It is alleged at paragraph 13(i) of the complaint that Capitol, through Manager Alexander, promulgated a rule prohibiting its employees from engaging in conversations in their work areas in an effort to dissuade them from engaging in union activity.

Employee Potts testified Center Manager Alexander told she and others at a group meeting at the timeclock on October 1, ''that he had been informed of the Union and that he was fully against it and that he forbidden anybody to talk union in any way and if he caught anybody doing it, that they would be terminated.'' Potts said that prior to the advent of the Union, employees talked freely while working. Employee Niles testified Alexander said ''anyone found talking during working hours about the Union would be dealt with severely.'' Niles likewise stated there had been no such rule prior to Alexander's announcement on October 1. Former employee Townsend testified Alexander said ''anybody caught talking about the Union in the warehouse would be . . . severely dealt with.''

Center Manager Alexander denied ever telling employees that if they talked about the Union, they would be disciplined or terminated.

I credit Potts', Niles', and Townsend's above-outlined testimony. I do not find their somewhat different versions of what Alexander said to detract from the overall reliability of their testimony. I specifically discredit Alexander's denials. Alexander was a particularly disingenuous witness.

It is clear that before the union campaign started, employees were free to talk and, in fact, as is set forth elsewhere in this decision, it was, helpful in the performance of their various job assignments for them to freely talk among themselves. It is just as clear that Alexander's prohibitions related to talking were specifically instituted to inhibit and/or interfere with the employees' union activities. Such violates Section 8(a)(1) of the Act and I so find. See *Turnbull Cone Baking Co*., 271 NLRB 1320 at 1358–1359 (1984), enfd. 778 F.2d 292, 296 (6th Cir. 1985). Alexander's threats to deal severely with anyone found to be talking about the Union during working hours or in the warehouse also constitutes an independent violation of Section 8(a)(1) of the Act and I so find.

b. *Granting a wage and other benefits increase*

It is alleged at paragraph 13(d) of the complaint that Center Manager Alexander, on or about August 16, granted employees an increase in wages and benefits in order to discourage them from selecting the Union as their collective-bargaining representative.

It is undisputed that Capitol informed its hourly employees orally and in writing at 3:30 p.m. on August 16, that their wages were being immediately increased by 10 percent and the increase would be retroactive to June 1. The employees were also informed they would receive an additional 5-percent performance increase effective October 1. The employees were notified ''we are changing our annual increase date for hourly employees from October 1 of each year to June 1.'' At the same time, the employees were also notified that ''effective immediately'' Capitol had expanded its holiday schedule to include ''three extra paid holidays.'' Additionally the employees were notified (via a separate memorandum dated the same day) that ''effective immediately'' they would be allowed to ''observe two (2) fifteen-minute paid break periods during scheduled 8-hour work days.''

Employee A. M. Harris testified without contradiction that at least from April to August 16, he and other employees had been told by Center Manager Alexander, among others, that there would be no wage increases for the hourly employees until October. Employee Ratliff testified that ''right after lunch'' on August 16, District Center Manager Alexander, Warehouse Manager Gallagher, and Human Resources Manager Garrison conducted a meeting for all hourly paid employees in the conference room.[30] Ratliff testified:

> Well, they told us that they had gone to area businesses and they checked out how much, you know, they were making there, what kind of benefits they had and we were comparable to all of those.
>
> . . . .
>
> Well, we asked them when we would get a raise and he [Alexander] said probably in October but he wasn't sure at the time.

District Center Manager Alexander testified he held several employee meetings between March and August at which wage increases were discussed. He said that on each occasion he told the employees that any increases in wages that came about would be in October pursuant to the ''Company's philosophy'' of giving increases at that time. Alexander explained that a majority of the employees had been hired around October 1, 1989, and were told that wage increases would be granted around October 1, 1 year later.

Alexander testified a representative, Mr. Solomon, from the Company's Los Angeles, California, office visited the Greensboro, North Carolina facility perhaps in May and discussed wage increases with the employees. He said the timeframe of June for wage increases came up during these discussions. According to Alexander, Capitol was attempting to prepare a wage program for its employees and that Human Resources Manager Garrison was responsible for doing so.

Human Resources Manager Garrison testified he was employed by Capitol on June 26. He said he immediately instituted discussions with representatives of other area companies regarding their wage scales. Garrison said he attended a meeting of Piedmont Associated Industries (PAI) on August 10 and at that meeting learned for the first time that PAI conducted wage studies and that one had been provided to Capitol for 1989. He said PAI had not completed its 1990 area wage survey at the time of the August 10 meeting. Garrison said that immediately after he returned from the PAI meeting, he located Capitol's copy of PAI's 1989 wage survey. He said he reviewed the survey and that Capitol thereafter took the action it did on August 16.

Garrison testified he first attended employee meetings sometime after he was hired on June 26. He said employees had always been concerned about when they would get pay raises. He testified that management had, prior to his arrival, been telling employees they would get an increase on October 1. He explained that Capitol had hired a number of employees on June 1 and asserts those employees had been told when they were hired they would get a wage increase after 1 year of employment. He said it was necessary in August to clear up the confusion that existed regarding when wage increases would be granted because some of the employees, particularly those hired in June, felt ''they were being cheated by the Company'' by having to wait until October 1 for a wage increase.

Garrison testified he and Capitol President Russ Bach, Senior Director of Field Operations and Human Resources Jim Harrington, and Center Manager Alexander were the ones who made the decision with respect to the wages and other benefits increases that were announced on August 16.

Center Manager Alexander testified that between the 1:30 and 3:30 p.m. employee meetings on August 16, he and Garrison spoke via telephone with Los Angeles-based Senior Director of Field Operations and Human Resources Harrington. Alexander said Harrington initiated the call. Harrington told Alexander and Garrison he had spoken with President Bach and they were authorized to institute pay raises at the North Carolina location. Alexander testified that following the conference call, he and Garrison prepared a written summary of Harrington's instructions with sufficient copies so that each employee could have written notification of the wages and other benefits increases. Alexander testified there was a sense of urgency about the wages and benefits increases in that Capitol ''needed to get this resolved now'' ''prior to people leaving'' work that day (August 16) because it ''was such a hot issue at that time.'' Alexander testified Harrington specifically asked if he and Garrison could make the announcement on the increases before the end of the workday. Alexander said he was instructed to also read the announcement to the employees.

Alexander testified he had no ''personal'' knowledge of the Union's organizing campaign until Monday, August 20. Garrison testified the first time he was ''personally'' aware of any union activities was on August 17. Shipping and Receiving Supervisor Gordon testified that prior to September, he worked as a receiving group leader in the warehouse and that on August 15, he signed an application card for membership in Local Union No. 391.[31] Gordon said that upon signing the union membership card, he immediately told then Shipping and Receiving Supervisor Paul Lilley ''there was a union drive starting and we would be signing union cards.''

Counsel for the General Counsel contends the wages and benefits increases were ''hastily announced'' ''to dissuade employees from supporting the Union and to assure the announcement was made before a petition was filed.'' Counsel for the General Counsel emphasizes that Capitol, through

[30] Alexander acknowledged that such a meeting took place at approximately 1:30 p.m. on August 16 and that he told the employees at that meeting there would be no wage increases until October 1.

[31] Gordon testified employee Cummings gave him the card.

Shipping and Receiving Supervisor Lilley, knew on August 15 of the Union's organizational drive and the momentum it was generating. Counsel for Capitol, on the other hand, argues the wages and other benefits increases were not announced or granted for the purpose of restraining the employees in the free exercise of their choice of whether or not to unionize but rather was done simply to clear up employee confusion regarding when wage increases would be granted. Counsel for Capitol asserts the ''urgency'' surrounding the situation was based on the fact the employees were constantly asking about wage increases.

The law on this point is clear, to promise or grant benefits to employees in order to dissuade them from supporting a union violates Section 8(a)(1) of the Act. See, e.g., *Mack's Supermarkets*, 288 NLRB 1082 at 1099 (1988). The announcement and/or grant of wages or other benefits increases is legally permissible if it can be shown that an employer was following its past practice regarding such increases or that the increases were planned and settled upon before the advent of union activity.

The facts and circumstances herein fully justify the conclusion, which I make, that Capitol's actions were, as contended by counsel for the General Counsel, for the purpose of dissuading employees from supporting the Union. Management learned on August 15 that union activity had started at its facility. The fact that neither Alexander nor Garrison claimed to have personal knowledge of any such activities at the time of the announcement is of no moment because management otherwise knew inasmuch as Shipping and Receiving Supervisor Lilley had been so informed. The PAI wage survey Capitol contends formed the basis for the increases had been in its possession since 1989. Garrison even acknowledged being aware of the survey for approximately a week before the announcement was made. Even armed with the information contained in the 1989 PAI wage survey, Garrison and Alexander told employees at 1:30 p.m. on August 16, that raises were not immediately justified because Capitol had checked the wages and benefits paid at other local companies and Capitol's benefits were in line with those of other area employers. What caused Capitol's sudden change between 1:30 and 3:30 p.m. on August 16, regarding wages and benefits for its employees? The answer appears to be the advent of union activity including the signing of union membership cards by a large number of employees. Furthermore, the haste with which Capitol acted suggests something more than just clearing up when future wage increases would take place. I note in this regard that Capitol acknowledged it acted hastily because it was a hot issue. The evidence suggests the heat that prompted the haste was the employees' union activities. Furthermore, Capitol went beyond just clearing up any misunderstanding among its employees regarding future pay increases by announcing retroactive increases along with additional paid holidays and daily break periods. All the above supports the inescapable conclusion that Capitol took the actions it did in order to nip in the bud the union activities of its employees. Capitol failed to demonstrate any past practice with respect to the increases it announced. In fact, Capitol's written announcement given to the employees reflects it was changing its past practice. The announcement reads in part, ''we are changing our annual increase date for hourly employees from October 1 of each year to June 1.'' Capitol also failed to demonstrate its actions had been planned and/or settled upon before the advent of the Union. I note that in fact Capitol, through Alexander and Garrison, were still announcing up until 2 hours before the change that October 1 would be the date for the next wages and benefits increases.

In summary, I conclude and find Capitol violated Section 8(a)(1) of the Act as alleged in paragraph 13(d) of the complaint when, on August 16, it granted its employees increases in wages and benefits in order to discourage them from selecting the Union as their collective-bargaining representative.

5. *Alleged video taping*

It is alleged at paragraph 13(h) of the complaint that Capitol, through an unknown official, on October 15, engaged in surveillance of the union activities of its employees.

Business Agent Brown testified he handbilled on October 5, at the east entrance to Capitol's parking lot. Brown testified, ''while I was handbilling, there was a gentleman with a camera just outside the breakroom door—it's an area with tables there—and he was facing me and then about 20 minutes later . . . I saw him in the parking lot which was quite a bit closer and then he returned back to that area where the tables were.'' Brown said the person's dress was casual and that he utilized a video-type camera. Brown said he answered employees' questions as he handbilled on that occasion. Brown estimated the parking lot to be about 40 feet from where he handbilled and that the patio break area where the tables were was approximately 300 feet away. Brown did not recognize the individual with the video camera nor did he even know if the individual was employed by Capitol. Brown observed the individual for a total of approximately 5 minutes.

Counsel for the General Counsel urges that the unknown Capitol official violated the Act when he photographed workers talking with and receiving handbills from Business Agent Brown. It is well established that absent legitimate justification, an employer's photographing of its employees while they are engaged in protected concerted activities constitutes unlawful surveillance. See, e.g., *Certainteed Corp*., 282 NLRB 1101 at 1114 (1987), and *15th Avenue Iron Works*, 279 NLRB 643 at 654 (1986). Even if the union agent was the focus of the photographing, that would not minimize the intimidating effect on employees. Furthermore, if the video camera was without film or otherwise inoperative, the coercive effect of the ostensible picture taking would still be present. However, in the instant case, one critical bit of evidence on which to base a finding is missing—counsel for the General Counsel failing to establish that the video camera operator was an official and/or agent of Capitol. It would be mere speculation on my part to conclude the camera operator was an official, agent, or supervisor of Capitol. This is especially so in light of the camera operator's casual dress and the almost universal ownership of hand held video recorders. Accordingly, I shall dismiss the allegations of paragraph 13(h) of the complaint.

6. Alleged violations attributed to Warehouse Operations Manager Don McLean

It is alleged at paragraph 13(e) of the complaint that Capitol, through Manager McLean, on or about August 23, inter-

rogated employees concerning their union activities, sympathies, and desires.

Employee Cummings credibly testified, without contradiction,[32] that ''around the end of August'' McLean came out of an office and wanted to know if the Union or Capitol's Los Angeles, California facility[33] had any type of attendance policy that he needed ideas for something he was working on. Cummings told McLean he didn't know of anything at that facility or that the Union had.

In agreement with counsel for the General Counsel, I conclude McLean's interrogation of Cummings was coercive interference and as such violated Section 8(a)(1) of the Act. In so concluding, I note McLean was the second shift warehouse operations manager at the time. His inquiry took place as he was leaving a plant office thus suggesting to Cummings his inquiry was also made on behalf of the highest levels of management. McLean had no valid reason for asking Cummings about Capitol's unionized facility in Los Angeles, inasmuch as he could have obtained information of that nature through Capitol itself. Thus, the inference is warranted that McLean's inquiry was an attempt to have Cummings express his union sentiments. Furthermore, no assurances were given to Cummings that any reply he might make, or even if he decided not to reply at all, would not result in any reprisals being taken against him.

C. *The Discharge of Anthony V. Harris on October 22, 1990*

It is alleged at paragraphs 14 and 15 of the complaint that Capitol and Graham on October 22, discharged and thereafter failed and refused to reinstate A. V. Harris because of his union and concerted protected activities in violation of Section 8(a)(1) and (3) of the Act.

Inasmuch as Capitol and Graham both are charged with violating the Act in the discharge of A. V. Harris, I shall not only trace his employment relationship with both employers, but I shall also examine the relationship between the two employers. I shall address the latter—the relationship between Capitol and Graham—before I examine Harris' employment history with both employers. This approach will facilitate understanding what happened to Harris and why.

Owner Gary Graham testified his company is in the ''business of referring temporary employees'' to clients in ''private industry, chamber of commerce, the government, manufacturing companies, banking, and financial institutions.'' Owner Graham said his company has approximately 150 to 200 clients at any given time and has approximately 8000 to 9000 temporary employees on its registers.[34] In any typical week, Graham will have ''400 to 600'' temporary employees on assignment with approximately ''50 to 100'' clients. Graham has approximately 26 employees on its permanent staff. In 1990, Graham filed approximately 3000 W-2 forms with the Internal Revenue Service.

Anyone wishing to be assigned as a temporary employee through Graham must visit one of Graham's three locations ''and fill out an application'' as well as provide information and identification necessary for ''I-9'' forms and authorize Graham to ''check referrals'' and ''do a police check on them.'' Applicants with Graham are asked to indicate the kinds of positions they are looking for, the rates of pay, hours, and shifts they'll work, what companies they prefer working for, and the types of assignments they will not accept. Applicants are required to review Graham's ''Rules and Regulations'' and safety policy. Applicants are required to view an orientation film. Owner Graham testified applicants are then given an ''overview on how they're paid, how to fill out their time card'' and ''if they go on assignment what is expected of them.'' According to Owner Graham, applicants are also told ''when they should get in touch with the Company if there's problems on the job.''

Graham alone decides whether to hire an applicant without any input from Capitol or any of the other clients it services. According to owner Graham, a client has no control over those originally assigned to the client as temporary employees. He said that after Graham receives a ''job order'' from a client for temporary employees, it matches the ''skills'' and ''qualifications'' the client seeks with those listed on its registers of temporary employees. When the skills and qualifications sought are matched with the applicants on Graham's registers, the tentatively selected employees are asked ''if they are interested in the assignment.'' After Graham has determined those interested in the assignment, their names are then forward to the client.

Owner Graham testified his company charges its clients for the services of the temporary employees at a rate negotiated between each client and Graham.[35] Graham then pays the temporary employees at a rate agreed on between Graham and the temporary employees. Graham pays all statutory taxes, worker's compensation charges, payroll taxes, and the like for the temporary employees with the remainder going to cover Graham's ''overhead and operating expenses'' as well as Graham's profits. Owner Graham testified that after a temporary employee is assigned to a client, one of its permanent staff members telephones the client on the first and second day to ensure the temporary employee has reported for work and at the proper place and time. If the assignment is long term, a Graham staff member will thereafter check on the temporary employee each Friday. Owner Graham testified that in case of clients using large numbers of temporary employees, such as Capitol, it assigns a specific staff member known as the project manager to the account. The Graham project manager coordinates with the client ''to make sure that we have the necessary number of people there'' and,

> To make sure they're doing satisfactory work . . . make sure everyone's there on time . . . brings them

[32] Capitol's failure to call McLean as a witness was not explained in any manner. Capitol's counsel stated on the record that he had met with McLean during the second day of trial. The failure of McLean to testify is significant only in evaluating the reliability of Cummings' testimony.

[33] Capitol operates a facility in Los Angeles, California, which is unionized.

[34] Graham services clients primarily in three North Carolina cities, namely, Greensboro, High Point, and Winston-Salem.

[35] Owner Graham explained rates are negotiated only after reviewing the clients' facilities including the actual work areas and after developing an understanding of the type work to be performed.

> their paychecks . . . [36] checks them in on the first and second shift . . . goes around routinely and asks them how they're doing, if they're having any problems . . . makes sure everything's going smooth.

Owner Graham testified the project manager does not perform any supervisory functions over the temporary employees at the client's jobsite. All supervision of temporary employees on the job is performed by the client's supervisory staff.

Owner Graham testified his company administers discipline related to temporary employees. He said if a client is unhappy with a temporary employee ''and they want them removed from the assignment we will remove them.'' Owner Graham testified ''we don't argue with the [client].'' Owner Graham said his company reassigns to some other account any temporary employee that a client has requested be removed from their job.

Graham's clients do not provide any benefits to the temporary employees. However, the clients are free to hire Graham's employees as their own after utilizing them for a specified time. Clients using large numbers of temporary employees, such as Capitol, are free to hire any or all of the temporary employees at any time without having to otherwise pay a predetermined penalty to Graham for doing so.

There is no written agreement between Graham and Capitol.

A. V. Harris first made application with Graham in March 1989 and was at different times thereafter employed on various job assignments. Harris filed a second application with Graham on August 7. Harris was thereafter told by a Graham representative that positions were open at Capitol and was asked if he would like to work there. On August 16, Harris was assigned to Capitol as a temporary employee in the shipping department where he worked for Shipping and Receiving Supervisor Gordon and Leadperson Clark Thompson.

A. V. Harris testified that before the Board-conducted election was held at Capitol that Supervisor Gordon told him he could be hired as a permanent employee on second shift but he would ''have to vote no for the Union.''[37] Harris testified he told Gordon he didn't have anything to do with the Union that he was working temporary and trying to find a permanent job ''and the Union wasn't even [his] concern.'' According to A. V. Harris, Gordon responded ''that he didn't want anyone working for him that was going to vote yes for the Union.''

A. V. Harris said he had a good work record at Capitol in that he did more than his share of work and that Gordon had told him at least twice a week he was doing a good job. Harris said that although his job only involved wrapping skids, he ''learned how to drive all their machines, fill out their shipping forms, [and] pick orders.'' In that regard, Harris testified everyone was helpful, that Supervisor Gordon showed him how to operate the ''bulk picking machine'' and that A. M. Harris showed him how to fill out shipping forms.

A. V. Harris testified that:

> About a week before the election [Supervisor Gordon] approached me and he told me he was going to have to let me go because he overheard me and another employee talking about that I wanted to join the Union and he was going to have to let me go.[38]

A. V. Harris explained:

> [Supervisor Gordon] called me in the break room and he just said he overheard me saying I wanted to join the Union and he was going to have to let me go. Then, my mother [Terrie McLaurin] came in shortly afterwards.[39]

A. V. Harris said that after his mother came into the area, he told her what had happened and that Gordon again stated he didn't want anybody working for him that was going to join the Union and he was letting Harris go. Harris testified his mother told Supervisor Gordon that he really needed his job and she would try to keep him away from T. K. Brown and A. M. Harris and anyone else she thought might vote ''yes'' for the Union.[40] Supervisor Gordon asked for a few minutes to think about the situation. A. V. Harris testified that in the meantime, he telephoned for someone to take him home but that about 10 minutes later Supervisor Gordon came back in and told him to return to work.

It is undisputed that A. V. Harris was thereafter discharged on October 22. Harris testified ''that Monday morning [Supervisor Gordon] just came up to me and told me I wasn't working out and said he was going to have to let me go.'' Harris testified a Graham representative also notified him that evening that Capitol would not be needing him any more. Harris told Graham's representative he had already been told by his Capitol supervisor earlier that afternoon.

McLaurin testified that she was not at work the second time Supervisor Gordon spoke with her son. She said the next day when she arrived at work, everyone wanted to know what had happened to her son. She said she spoke with Supervisor Gordon who told her ''he had overheard [Harris] talking about the Union and that he just wasn't going to work out and that he had to let him go.'' McLaurin testified she ''begged'' Gordon to take her son back, that he really needed a job, but that Gordon told her he had enough people working there that thought they could do whatever they wished. Gordon also told McLaurin he was not going to hire A. V. Harris back ''and it made him feel good to let [Harris] go.''

Shipping and Receiving Supervisor Gordon testified A. V. Harris worked for him as a ''shrink-wrap person'' in ship-

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[36] Temporary employees fill out their own time records on Graham provided forms which are then given to a designated Graham representative or to the Graham project manager assigned to that client as is the case with Capitol. The payroll records are also signed by a representative of the client.

[37] Harris said Gordon told him Capitol was going to hire a number of people and he was pretty sure he would be among those hired.

[38] Harris testified on cross-examination he told Gordon he (Gordon) was lying about overhearing him talk about the Union because he had not had anything to do with the Union.

[39] Harris said Gordon repeated the same things he had said to him to his mother.

[40] Harris' mother, employee Terrie McLaurin, corroborated his testimony and stated:

> I sort of begged him to keep [Harris] on and he told me that if I would see to it that [Harris] didn't associate with anyone that had anything to do with the Union or talk to those guys or have any remarks to say about the Union that he would keep him on on my say so.

ping and receiving. He said Harris' job involved wrapping and loading skids onto trucks for shipment. Gordon said Shipping and Receiving Team Leader Thompson ''identified [Harris] as a good worker'' that Capitol could put on as a ''permanent'' employee. Gordon said he brought Harris and Thompson to his office during the first part of October and told Harris that ''he was a good worker'' and he would probably recommend he be permanently employed by Capitol. Gordon testified that approximately 2 weeks later he observed A. V. Harris driving a piece of equipment known as a ''bulk picker'' that he was not authorized to drive. Gordon told Leadperson Thompson that they ''needed to have a talk with [Harris] because he was not supposed to be on that equipment.'' Gordon then brought Harris to his office and told him if he had completed his assigned tasks he should see Leadperson Thompson to find out what else they wanted him to do. According to Gordon, Harris said he had been told by employee T. K. Brown that he could help out by operating the ''bulk picker.'' Gordon said he told Harris he was ''doing a good job'' and was being considered for a permanent position with Capitol but that when he needed additional work assignments he was to see Leadperson Thompson. Gordon said that ended their conversation.

Gordon testified that after he had talked with A. V. Harris, Harris' mother told him she had heard he had counseled Harris and that she really wanted her son to work at Capitol and that she had spoken to him and that Capitol shouldn't have any more problems with him. Gordon told Harris' mother he didn't normally counsel with temporary employees but had done so in Harris' case on her behalf. Gordon testified Harris' mother told him ''you know that I'm going to vote No'' and added ''my son has no Union sentiments either.'' Gordon testified he had not said anything to cause Harris' mother to make the above comments and he said he did not respond thereto. Gordon said the conversation ended with Harris' mother saying she would again speak to Harris and that Capitol would not have any more problems with him.

Gordon testified that approximately 3 days later he again observed Harris operating the same ''bulk-picker'' equipment he had spoken to him about earlier. After bringing Harris to his (Gordon's) office, Gordon told him he was going to dismiss him. Gordon ''escorted'' Harris to the breakroom where Harris ''pleaded his case'' stating ''he really wanted to work there . . . and . . . knew he could do the job.'' Gordon told Harris he wasn't doing what he had been asked so he was going to have to let him go.

Supervisor Gordon testified Harris' mother, employee McLaurin, thereafter came to the breakroom and ''pleaded'' with him to let Harris keep his job. Gordon told McLaurin he had given Harris more chances than he usually gave temporary employees, that he had already talked to Harris and he was going to let him go. Gordon said no reference was made to the Union in his second conversation with McLaurin.

Supervisor Gordon testified A. V. Harris had never at any time mentioned that he was involved in any union activities. Gordon denied ever telling Harris that if he voted no in the Board-conducted election, he would receive a permanent position with Capitol. Gordon did not recall ever overhearing Harris and any employee(s) talking about the Union.

Human Resources Manager Garrison testified Supervisor Gordon had decided to terminate Harris and had already informed Harris before he, Garrison, became involved. Garrison testified Gordon told him Harris was ''not working out'' that he was ''being uncooperative'' in that by the afternoon hours ''it was difficult to find'' him. Garrison could not recall Gordon saying anything about Harris operating equipment he was not supposed to. Garrison testified he telephoned Graham's High Point, North Carolina manager, LaDonna McGhee, and told her A. V. Harris ''was not working out'' and ''was to be replaced.'' Garrison said he did not mention to McGhee anything about any union activity on Harris' part.

Supervisor Gordon testified he also contacted someone at Graham and spoke with an individual named ''Misty.'' Gordon told ''Misty'' Harris was ''not working out,'' ''not cooperating with his group leader,'' and Capitol ''didn't need him . . . any more.'' Gordon said he told ''Misty'' that Harris had been driving equipment in an area where he wasn't supposed to be. Gordon said he did not mention anything about any union activity on Harris' part to ''Misty'' nor did he explain his request that Harris be replaced in any greater detail than is set forth above.

Graham's customer service representative, Misty Lynn Floyd, testified she took a telephone call from Capitol's supervisor, Gordon, on October 22, in which he asked that Graham end Harris' assignment at Capitol. Harris' personnel file reflected Gordon had indicated Harris ''was not working out,'' ''not being cooperative with his supervisors,'' and had been ''caught several times in the breakroom when he was supposed to be working.''[41]

Graham's High Point, North Carolina manager, LaDonna McGhee, testified she received a telephone call on October 22, from Capitol's human resources manager, Garrison, concerning A. V. Harris. McGhee testified Garrison told her that Supervisor Gordon wanted Harris' assignment with Capitol ended because Harris had not been doing what he had been told, had not been cooperative, and had been caught him in the breakroom several times when he was supposed to have been in the warehouse working. She said Garrison made no mention of any union activity on Harris' part. McGhee also stated she was not otherwise aware of any union activities on Harris' part. McGhee said she telephoned Harris at home that night and told him his assignment with Capitol was over. McGhee testified she told Harris:

> Exactly what Rich Garrison had told me, that . . . he was not doing what he had been asked to do. He was not being cooperative with the supervisors . . . [and] . . . about the break room where they would find him at 3:00 when he didn't really check out till 3:30.

McGhee testified Harris said he understood exactly where they were coming from and asked about other work assignments. McGhee told Harris to call Graham's office the next day and stated that was the last contact she had with A. V. Harris. She said no mention was made of the Union in her conversation with Harris.

Graham Representative Floyd testified, with supporting documentation, that after A. V. Harris was removed from his assignment at Capitol, he was offered, and accepted, assignments at Hyundai Furniture on October 25, and Omega Stu-

[41] Floyd testified Gordon made no mention, nor was she otherwise aware of, any union activities on A. V. Harris' part.

dios on October 29, but did not report for work at either assignment.[42]

Graham's customer service representative, Laura Scott, testified, with supporting documentation, that she terminated A. V. Harris' employment with Graham on October 29, due to his work history. She said he had failed to report for a job assignment that day with Omega Studios. She stated she terminated Harris solely on his record and said she had no contact with him on that occasion. Scott testified that no one from Capitol ever discussed Harris' work performance with her and that no one at Graham or Capitol ever mentioned any union activities on Harris' part.

Before ascertaining if counsel for the General Counsel established a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in Capitol's requesting that Graham remove Harris from his assignment at its operations, it is necessary to make certain credibility resolutions. I am persuaded A. V. Harris and his mother, McLaurin, testified truthfully regarding their exchanges with Supervisor Gordon. As alluded to elsewhere in this Decision, Gordon did not impress me as a believable witness. Accordingly, I do not credit his account of his exchanges with Harris and McLaurin regarding Harris' removal from Capitol. In discrediting Gordon, I note his account of the conversations do not withstand close scrutiny. For example, he claims it was McLaurin who raised the subject of the Union in one of their two meetings by telling him she was going to vote against the Union and that her son had no union sentiments. However, he placed the date of these alleged comments as having been on or about October 19, some 7 days after the Board had already conducted the representation election at Capitol. It is simply unbelievable that McLaurin would have made the comments attributed to her by Gordon especially after the representation election had already been held.

Based on the credited facts, I find counsel for the General Counsel established a prima facie case under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). That Harris' future with Capitol was directly related to his response to the union's campaign is borne out by Supervisor Gordon's comments to Harris made approximately 1 week before the Board-conducted election that he could be hired as a permanent employee[43] but he would have to vote ''no'' with respect to the Union.[44] Only after McLaurin promised Supervisor Gordon that she would see to it that her son, A. V. Harris, did not associate with or talk to anyone that had anything to do with the Union that Gordon allowed Harris to continue working at Capitol. However, 1 week later, Supervisor Gordon told Harris he was not working out and he was going to have to let him go. That Harris' not ''working out'' was related to the Union is established by Supervisor Gordon's response to Harris' mother's inquiry regarding ''what had happened'' to Harris. Supervisor Gordon told Harris' mother he had overheard Harris talking about the Union and he just was not going to work out and he was letting Harris go.[45] Gordon thereafter did take the necessary steps to have Harris removed from his assignment at Capitol.

Having concluded, based on the evidence outlined above, that counsel for the General Counsel established the requisite elements for a prima facie case, I shall now consider whether Capitol met its burden of demonstrating that Harris would have been removed from his job even in the absence of any union activities (real or perceived) on his part. Capitol clearly failed to make such a showing. Supervisor Gordon's contention that Harris was discharged for twice operating a piece of equipment he was not authorized to use simply is not borne out in this record. Harris credibly testified Supervisor Gordon ''showed [him] how to run the bulk picking machine.'' Gordon acknowledged Harris was a good worker and further acknowledged he had told Harris he would recommend he be considered for permanent employment with Capitol. That Harris was a good worker is also borne out by the fact he had not only been praised by Supervisor Gordon, but by Leadperson Thompson as well as by certain of his fellow workers. Having found that the asserted reason for Harris' removal from the job was false, I find Capitol failed to demonstrate Harris would have been removed in the absence of any protected conduct on his part. Accordingly, I find Capitol violated Section 8(a)(3) and (1) of the Act by having him removed from his job.

Next, consideration must be given to whether Graham violated Section 8(a)(3) and (1) of the Act by its actions related to A. V. Harris. First, there is no dispute that Graham representatives removed Harris from his assignment at Capitol in response to Capitol's request. The evidence is unrefuted that Graham was simply following its normal practice of removing an employee from an assignment where the employer utilizing the employee requested such action. It was not Graham's policy and it did not, in the instant case, discharge the employee that its client had requested be removed from its operation, rather, it simply reassigned the employee. Second, the evidence is clear that Graham was not aware of Harris' union sentiments or of any union activities on his part. Third, Graham offered Harris other job assignments which he accepted but never reported for work at.[46]

Before addressing the ultimate question of whether Graham can be held responsible for Capitol's decision to request Harris' reassignment in light of the fact Capitol was unlawfully motivated in making the request, it is necessary to determine, among other things, if the two are joint employers. It is alleged at paragraph 10 of the complaint that they are joint employers of all temporary employees provided by Graham to Capitol.

The determination of whether Capitol and Graham are joint employers ''is essentially a factual issue.'' *Boire v. Greyhound Corp.*, 376 U.S. 473 at 481 (1964). The Board continues to adhere to the standards set out in *NLRB v.*

[42] Harris could not recall being offered these jobs.

[43] I note in crediting Harris' testimony that the same day Gordon made these comments to Harris, Capitol offered employment to certain temporary employees.

[44] I find, as alleged at par. 13(m) of the complaint, that Gordon's comments constitute an unlawful threat in violation of Sec. 8(a)(1) of the Act.

[45] I find the above-outlined comments constitute a threat to discharge employees observed talking about the Union as well as creating an impression that employees' union activities are under surveillance and that Capitol would refuse to hire anyone known to have talked about the Union.

[46] I make this finding based on the testimony of Graham's representatives as well as on supporting documentation notwithstanding Harris' contrary protestation.

Browning-Ferris Industries, 691 F.2d 1117 (3d Cir. 1982), to determine whether separate business entities constitute joint employers. See, e.g., *Lucky Service Co.*, 292 NLRB 1159 (1989). The standards are essentially ''whether two or more employers share or co- determine those matters governing the essential terms and conditions of employment.'' Did Capitol and Graham both exert significant control over the temporary employees assigned to Capitol by Graham such that they constitute ''joint employers'' within the meaning of the Act? I am persuaded Capitol and Graham are joint employers of the temporary employees. It is clear they both shared and co-determined the essential terms and conditions of employment of the temporary employees on a day-to-day basis. Capitol's personnel assigned all work to and directly supervised the temporary employees Graham assigned to it. Capitol's personnel effectively disciplined the temporary employees in that Capitol's supervisors gave day-to-day instructions to the temporary workers and as needed took corrective actions related thereto. Capitol was free at any time to hire any or all of the temporary employees as its own permanent employees. Although the temporary employees kept their own time records, derived their benefits from, and were paid by Graham, Graham negotiated their wage rates with Capitol. There is no indication in the record that the temporary employees were held out to be anything other than Capitol employees. Although Graham actually hired the temporary employees, Capitol could effectively fire any or all of them by simply requesting that Graham remove any or all of them from its operations. Graham always honored such requests. Although there is no common ownership or common financial control between Graham and Capitol, such is insufficient to defeat or offset the cumulative effect of the evidence that they are joint employers. In light of all the above, I find Graham and Capitol to be joint employers for the purposes of the Act.

Having concluded that Graham and Capitol are joint employers does not, however, resolve the question of whether Graham should be held vicariously liable for the unlawful acts of Capitol. There is no argument or evidence of culpability on the part of Graham apart from being a joint employer with Capitol. In *Pacemaker Driver Service*, 269 NLRB 971 (1984), revd. in pertinent part sub nom. *Carrier Corp. v. NLRB*, 768 F.2d 778 (6th Cir. 1985), the Board adopted an administrative law judge's decision in which one employer was held liable for the actions of another simply on the basis the two were joint employers. However, as indicated above, that portion of the *Pacemaker* decision was reversed on appeal. In reversing on that specific point, the court held:

> The evidence in the case did not demonstrate that *Pacemaker* ''knowingly participated'' in the effectuation of the unfair labor practices . . . under the circumstances *Pacemaker* cannot be held monetarily responsible for violations it did not commit. The Board's order shall therefore be modified to remove *Pacemaker's* joint liability for backpay to the employees.

Stated differently, the court decided one joint employer could not be held monetarily responsible for violations of the Act committed by the other joint employer in the absence of evidence that the employer knowingly participated in effectuation of the unfair labor practices. That is, however, what counsel for the General Counsel is asking that I do herein, in that he urges I conclude Graham is vicariously liable for the unlawful actions of Capitol on the sole basis of their joint employer status. I note, in agreement with Graham's counsel, that there is no showing of any kind that Graham ''knowingly participated'' or even ''acquiesced without protest'' to the unfair labor practices of Capitol related to Harris' removal from Capitol's operations. Notwithstanding all the above, I am persuaded Counsel for the General Counsel's position must prevail. The Board has never modified nor otherwise overruled its *Pacemaker* holding. I am bound by Board precedence until the Board or Supreme Court overrules such. *Iowa Beef Packers*, 144 NLRB 615 (1963). Accordingly, I conclude Graham and Capitol are joint employers jointly and severally liable for the actions taken herein related to Harris' removal from Capitol's operations on or about October 22.[47]

D. *The Bargaining Order*

Counsel for the General Counsel argues that a bargaining order is warranted in light of Capitol's conduct and the Union's established majority status.

As the Board noted in *Pembrook Management*, 296 NLRB 1226, 1227 (1989):

> It is well settled that the Board will issue a bargaining order when: (1) the union has obtained valid authorization cards from a majority of the employees in the bargaining unit and thus is entitled to represent the employees for collective-bargaining purposes; and (2) the employer's refusal to bargain with the union is motivated not by a good-faith doubt of the union's majority status, but by a desire to gain time to dissipate that status, as evidenced by the commission of substantial unfair labor practices during its antiunion campaign efforts to resist recognition. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

In *Gissel*, supra, the Supreme Court set forth certain standards relating to bargaining orders as follows: (1) a bargaining order may be granted where an employer's unfair labor practices are ''outrageous'' and ''pervasive''; (2) a bargaining order may be granted ''in less extraordinary cases marked by less pervasive unfair labor practices which nonetheless still have a tendency to undermine majority strength''; and (3) a bargaining order is not appropriate in cases involving minor or less extensive unfair labor practices ''which, because of their minimal impact on the election machinery, will not sustain a bargaining order.'' The Board will not burden itself with deciding whether an employer's unfair labor practices fall within the first or second category for the issuance of a bargaining order as delineated by the *Gissel* court if regardless of the category the unfair labor practices clearly are sufficient to warrant a bargaining order. See, e.g., *International Door*, 303 NLRB 582 (1991).

[47] In so holding, I am not unmindful that the Board appears to be moving away from holding employers strictly liable in other situations such as in the use of hiring halls. See, e.g., *Wolf Trap Foundation*, 287 NLRB 1040 (1988), and *Toledo World Terminals*, 289 NLRB 670 (1988).

I agree with counsel for the General Counsel that a bargaining order is necessary.

First, the complaint alleges the Union achieved majority status on August 17, and on that same date demanded recognition. On August 22, Capitol denied the Union's demand. As of August 19, Capitol employed 72 bargaining unit employees. The Union had 58 valid, signed authorization cards as of August 17.[48] Thus, it is clear an uncoerced majority of Capitol's unit employees designated and selected the Union as their collective-bargaining representative on or before August 17.

As the Board did in *International Door*, supra, I find it unnecessary to determine whether Capitol's unfair labor practices are within the first or second category for the issuance of a bargaining order as delineated by the *Gissel* court because it is quite clear the unfair labor practices are sufficient to warrant a bargaining order regardless of the category. As detailed elsewhere in this decision, the record reveals numerous and far-reaching unfair labor practices on the part of Capitol spanning the course of the union election campaign and thereafter. Capitol countered the Union's organizational campaign by (1) coercively interrogating various employees about their union activities and how they intended to vote; (2) created the unlawful impression that its employees' union activities were under surveillance; (3) promulgated a no talking rule to interfere with its employees protected rights; (4) interfered with its employees' efforts to engage in union activities by more closely monitoring their work activities; (5) threatened its employees with discharge because of their union activities; (6) solicited grievances; (7) threatened its employees with loss of benefits if they selected the union as their collective-bargaining representative; (8) threatened it would be futile for the employees to select the Union as their collective-bargaining representative; (9) granted wages and other benefits increases to discourage its employees from selecting the Union as their collective-bargaining representative; (10) threatened not to permanently hire an employee unless the employee voted against the Union; and, (11) discharged an employee based on union considerations. Capitol's unfair labor practices include examples of what are referred to as ''hallmark violations''[49] such as threats to discharge and not hire and an actual discharge. Further, I note that immediately after the Union began its organizing campaign, Capitol announced and granted a substantial retroactive wage and other benefits increase. Capitol acknowledged wages were ''a hot issue'' with the employees at the time it made its announcement. As the Board noted in *Pembrook Management*, supra, quoting from *Tower Records*, 182 NLRB 382, 387 (1970), enfd. 79 LRRM 2736 (9th Cir. 1972), that ''it is a fair assumption that in most instances where employees designate a union as their representative, a major consideration centers on the hope that such representative may be successful in negotiating wage increases.'' The Board went on to note that where an employer unilaterally grants a wage increase after a union campaign has started, it is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand, union representation might no longer be needed. This is particularly so in the instant case in that Capitol knew wages and other benefits were ''hot issues'' among its employees, however, it took no actions related thereto until it learned of union activity and then the very next day hastily altered its past practice regarding wage increases by announcing not only a 10-percent wage increase but that the increase would be retroactive. Capitol also added new paid holidays at the same time. Inasmuch as it is not the Board's policy to require that unilaterally granted benefits be rescinded, it is difficult to remedy such by traditional means. This difficulty is exacerbated by Capitol's threats of loss of benefits and futility. Capitol's actions and policy of rewarding company support and punishing union support creates an atmosphere in which it is difficult to find that free choice could be exercised in a second election. See *Pembrook Management*, supra. Furthermore, the fact employees were monitored more closely and prohibited from engaging in work area conversations in order to dissuade them from supporting the Union further renders it unlikely that employee sentiment can be freely expressed in a second election. In light of the Union's majority status and the fact that Capitol's pervasive unfair labor practices render it unlikely that employee sentiment can be freely expressed in a second election, I find Capitol was obligated to bargain with the Union from August 17, the date the Union requested recognition, and I so order.

Having found that Capitol's bargaining obligation commenced on August 17, I find it further violated the Act by, on or about January 19, 1991, changing its employees' terms and conditions of employment as alleged at paragraph 22 of the complaint. Specifically, Capitol unilaterally, and without notice to or bargaining with the Union, distributed an employee handbook that affected the wages, hours, and working conditions of its employees by changing past practices and/or policies and instituting different and new policies that established factors in addition to seniority upon which employees would be evaluated for the awarding of jobs; that established a progressive disciplinary system for tardiness; by instituting a ''Levels of Discipline'' policy—a formal progressive disciplinary system; that instituted a peer review process; that instituted a layoff and recall policy; that established three new paid holidays; that instituted a time off policy for personal leave; and that established production quotas. I find Capitol's actions violated Section 8(a)(5) and (1) of the Act.

[48] The authorization cards contain clear and unambiguous language that reflects a signer is making ''application for membership in Local Union No. 391'' and designates the Union as the signer's ''representative for purposes of collective bargaining.'' Capitol's contention that certain authorizations cards should be disqualified on the basis the signers were ''group leaders'' is without merit. ''Group leaders'' were specifically included in the unit and voted unchallenged in the Board-conducted election. Counsel for the General Counsel offered for introduction into evidence two validly signed authorization cards for certain employees. At trial I rejected a second card where a card for that individual had already been received into evidence on the basis of duplicate cards. A review of the record, however, reflects the cards are not duplicates but rather two separately signed cards with the second card being executed approximately 3 to 5 days after the first card was signed. I am persuaded the rejected cards should be accepted and made a part of the record herein. Accordingly, I am removing from the rejected exhibit file and making a part of the record herein G.C. Exhs. 104, 105, 108, 110, 112, 113, 114, 115, 122, 123, 125, 126, 130, 134, 139, 141, 142, 144, 145, 146, 149, 150, 152, 153, 154, 155, and 157.

[49] See, e.g., *NLRB v. Jamaica Towing*, 632 F.2d 208 (2d. Cir. 1980).

E. *The Objections to the Election in Case 11–RC–5723*

Having found support in the record for certain of the objections to the conduct affecting the results of the election filed by the Union (Petitioner) in Case 11–RC–5723, namely Objections 1, 2, 3, 5, 6, 7, 9, 10, 12, and 13 and having also concluded that such conduct violated Section 8(a)(1) of the Act, I conclude Capitol has interfered with the exercise of employee free choice in the election conducted on October 12. I recommend that election be set aside.

CONCLUSIONS OF LAW

1. Capitol EMI Music, Inc. is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Graham & Associates Temporaries Inc. is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Capitol EMI Music, Inc. and Graham & Associates Temporaries, Inc. are joint employers of the temporary employees provided by Graham to Capitol at Capitol's Greensboro, North Carolina facility.

4. Chauffeurs, Teamsters and Helpers Local 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

5. All regular full-time warehouse employees, including promotions department, computer department, order department, and shipping and receiving departments, and group leaders employed at Capitol's Beechwood Drive, Greensboro, North Carolina facility; excluding all other employees, office clerical employees, and guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. Since on or about August 17, 1990, the Union has been the exclusive collective-bargaining representative of all employees employed in the above appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. By engaging in the following conduct, Capitol violated Section 8(a)(1) of the Act by: coercively interrogating employees; creating the unlawful impression that its employees' union activities were under surveillance; promulgating a no-talking rule to interfere with its employees protected rights; more closely monitoring its employees work activities in order to interfere with its employees' efforts to engage in union or protected activities; threatening its employees with discharge because of their union activities; soliciting employee complaints and grievances and making implied promises related thereto; threatening its employees with loss of benefits if they selected the Union as their collective-bargaining representative; threatening its employees it would be futile for them to select the Union as their collective-bargaining representative; granting wages and other benefits increases to discourage its employees from selecting the Union as their collective-bargaining representative; and, threatening not to permanently hire employees unless they voted against the Union.

8. By discharging its employee Anthony V. Harris on or about October 22, 1990, and thereafter refusing to reinstate him because of his union, concerted and protected activities, Capitol and Graham engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

9. By engaging in the following conduct, Capitol violated Section 8(a)(5) and (1) of the Act:

> (a) Refusing on and after August 17, 1990, to recognize and bargain with the Union as the collective bargaining representative of the employees in the above appropriate unit.
>
> (b) Instituting different and/or new policies that affected wages, hours, and working conditions, unilaterally altering its past practice regarding the awarding of jobs; altering its past practice regarding attendance; instituting a formal progressive disciplinary system; instituting a peer review process; instituting a layoff and recall policy; establishing three new paid holidays; instituting a time off policy that provides for personal leave; and, establishing production goals with disciplinary enforcement procedures without giving the Union notice and/or an opportunity to bargain.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Capitol engaged in violations of Section 8(a)(1), (3), and (5) of the Act, and that Graham engaged in acts that violate Section 8(a)(3) and (1) of the Act, I shall recommend that both be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Capitol and Graham discriminatorily discharged employee Anthony V. Harris, I shall recommend Harris be offered immediate and full reinstatement to his former position of employment with Capitol or, if his former position of employment no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed, and that he be made whole for any loss of earnings he may have suffered by reason of the discrimination against him with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[50] I also recommend that Capitol and Graham be ordered to expunge from all files any reference to Harris' discharge and notify him in writing that this has been done and that evidence of the unlawful actions will not be used as a basis for any future personnel actions against him.

Inasmuch as I have found that Capitol breached its bargaining obligations under the Act by refusing to recognize and bargain with the Union and by instituting unilateral changes affecting wages, hours, and terms and conditions of employment, I recommend Capitol be ordered to recognize and bargain with the Union and take certain affirmative action including the rescission of the new and/or different policies or work rules unilaterally implemented in January 1991, and return to the status quo ante with respect to the enforce-

[50] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621.

ment of any old rules and/or policies that may have existed at that time.

Finally, I recommend Capitol and Graham be ordered to post separate appropriate notices to employees, copies of which are attached hereto as ''Appendix A'' and ''Appendix B,'' for a period of 60 days in order that employees may be apprised of their rights under the Act and Capitol's and Graham's obligation to remedy the unfair labor practices. I have recommended separate notices in order to better address each employer's specific violations.[51]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[52]

ORDER

The Respondent, Capitol EMI Music, Inc., Greensboro, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because of their membership in, or activities on behalf of, the Union or because they engaged in other protected concerted activities.

(b) Coercively interrogating employees as to their own or other employees' union activities or union support.

(c) Creating among its employees the impression that their union activities are under surveillance.

(d) Promulgating no-talking rules to interfere with employees' protected rights.

(e) Interfering with its employees' attempts to engage in union activity by more closely monitoring their work activity.

(f) Threatening its employees with discharge because of their union activities.

(g) Soliciting employee grievances and promising to remedy same in an effort to discourage its employees' union activities.

(h) Threatening its employees with loss of benefits if they selected the Union as their collective-bargaining representative.

(i) Threatening it would be futile for the employees to select the Union as their collective-bargaining representative.

(j) Granting wages and other benefits increases to discourage its employees from selecting the Union as a collective-bargaining representative.

(k) Threatening not to permanently hire employees unless they voted against union representation.

(l) Refusing to recognize and bargain with its employees' designated bargaining agent for the appropriate unit of employees.

(m) Unilaterally instituting new work rules and/or policies without notice to and opportunity for bargaining with its employees' designated bargaining agent for the appropriate unit of employees.

(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with Chauffeurs, Teamsters and Helpers Local 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive bargaining representative of its employees in the appropriate unit and if an agreement is reached as to wages, hours, and other terms and conditions of employment, embody the understanding in a signed, written document. The appropriate unit is:

> All regular full-time warehouse employees, including promotions department, computer department, order department, and shipping and receiving departments, and group leaders employed at Capitol's Beechwood Drive, Greensboro, North Carolina, facility; excluding all other employees, office clerical employees, and guards and supervisors as defined in the Act.

(b) Rescind the new and/or different work rules or policies unilaterally implemented in January 1991, and return to the status quo ante with respect to the enforcement of old rules and/or policies that may have existed prior to that time.

(c) Offer Anthony V. Harris immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of its unlawful conduct in the manner set forth in the remedy section of this decision and expunge any reference to his discharge from his work record.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Greensboro, North Carolina facility copies of the attached notice marked ''Appendix.''[53] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[51] See preceding Board's Order of this case for modification.

[52] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[53] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities

WE WILL NOT discharge employees because of their activities on behalf of the Union.

WE WILL NOT coercively interrogate our employees as to their own or other employees' union activities or support.

WE WILL NOT create the impression that our employees' union activities are under surveillance.

WE WILL NOT promulgate a no-talking rule in order to interfere with our employees' protected rights.

WE WILL NOT interfere with our employees' attempts to engage in union activity by more closely monitoring their work activities.

WE WILL NOT threaten our employees with discharge because of their union activities.

WE WILL NOT solicit and promise to remedy our employees' grievances in an effort to discourage their union activities.

WE WILL NOT threaten our employees with loss of benefits if they select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees that it would be futile for the them to select the Union as their collective-bargaining representative.

WE WILL NOT grant wages and other benefits increases in order to discourage our employees from selecting the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees that they will not be permanently employed unless they vote against the Union.

WE WILL NOT refuse to recognize and bargain with our employees' designated bargaining agent for the appropriate unit of employees and WE WILL NOT unilaterally institute new and/or different work rules or policies without notice to and bargaining opportunity being afforded to their bargaining agent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain with Chauffeurs, Teamsters and Helpers Local 391, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL–CIO as the exclusive bargaining representative of our employees in the appropriate unit and, if an agreement is reached as to wages, hours, and other terms and conditions of employment, embody the understanding in a signed, written document. The appropriate unit is:

> All regular full-time warehouse employees, including promotions department, computer department, order department, and shipping and receiving departments, and group leaders employed at Capitol's Beechwood Drive, Greensboro, North Carolina, facility; excluding all other employees, office clerical employees, and guards and supervisors as defined in the Act.

WE WILL rescind the new and/or different work rules or policies unilaterally implemented in January 1991, and return the status quo ante with respect to the enforcement of old rules or policies if any existed prior to that time.

WE WILL offer Anthony V. Harris immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest.

WE WILL notify Anthony V. Harris that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

CAPITOL EMI MUSIC, INC.